No. 91-1615

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JESSE TURNER, *et al.*,

Appellants,

v.

THE STATE OF ARKANSAS, *et al.*,

Appellees.

On Appeal From the United States District Court For The Eastern District of Arkansas, Western Division

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is all relief under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, precluded:

(a) If the members of a protected class of citizens seeking relief are not sufficiently numerous to constitute a majority in a single-member district?

(b) If a redistricting plan that fragments members of a protected class of citizens among several congressional districts results in no greater vote dilution than under the pre-existing plan?

(c) In the absence of proof that a challenged redistricting plan results in members of a protected class of citizens having *both* less opportunity than other members of the electorate to participate in the political process *and* less opportunity to elect representatives of their choice?

(d) If proof of diminished opportunity to participate in the political process is limited to evidence consisting of the factors expressly articulated as relevant to that inquiry by the Congress that amended the Voting Rights Act in 1982?

2. May a claim that a redistricting plan intentionally discriminates against a racial minority by fragmenting minority voters among several congressional districts in violation of the Fourteenth and Fifteenth Amendments be rejected as a matter of law:

(a) If members of the victimized class are not sufficiently numerous to constitute a majority in a single-member district?

(b) If the challenged plan is not a retrogression from a previously formulated court-imposed districting plan?

(c) If the plaintiffs are unable to prove that the plan has a discriminatory effect as measured by the

standards adopted by this Court for political gerrymandering in *Davis* v. *Bandemer*, 478 U.S. 109 (1986)?

PARTIES TO THE PROCEEDING BELOW

Appellants, plaintiffs in the action below, are as follows: Jesse Turner, Christene Brownlee, Freddie Lyon and Jack Foster, on behalf of a class consisting of all black residents of the First, Second and Fourth Congressional Districts of the State of Arkansas who are eligible to vote in congressional elections.

Plaintiffs-intervenors in the action below, for purposes of the Voting Rights Act and constitutional claims, include the following: William Walker, Jr., Jerry Jewell, Jean Edwards, Bill Lewellen, William Townsend, Irma Brown, Ben McGee, Jacqueline Roberts, Judy Smith, T.E. Patterson, Kathestelle Bryant and Evangeline Brown; and, for purposes of the malapportionment claim, Jim Malone, Jr., on behalf of the voters of Lonoke County, Arkansas.

Appellees, defendants in the action below, are as follows: The State of Arkansas; Bill Clinton, Governor of Arkansas and Chairman of the State Board of Election Commissioners; Jerry P. Bookout, President *Pro Tempore* of the Arkansas Senate; John M. Lipton, Speaker of the Arkansas House of Representatives; and William J. McCuen, Secretary of State and Secretary of the Board of Election Commissioners.

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JURISDICTIONAL STATEMENT

In this voting rights case, appellants, Jesse Turner, *et al.*, appeal from the final judgment of a three-judge panel of the United States District Court for the Eastern District of Arkansas, Western Division, dated November 15, 1991, granting summary judgment against appellants' Voting Rights Act and constitutional claims.

Appellants contend that Act 1220 of the 78th Arkansas General Assembly, which redistricts Arkansas' four congressional districts, results in appellants having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973. Appellants also contend that Act

1220 intentionally fragments and dilutes their voting strength in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The district court dismissed appellants' Voting Rights Act and constitutional claims pursuant to summary judgment on the basis, *inter alia*, that black citizens in Arkansas were not sufficiently numerous to form an electoral majority in a single-member congressional district.

OPINIONS BELOW

The district court opinions and judgment are unreported and are reproduced in Appendix ("App.") A, *infra*, 1a-66a, App. B, *infra*, 67a-76a, and App. C, *infra*, 77a-78a, respectively.

JURISDICTION

On December 10, 1991, appellants timely filed in the court below a Notice of Appeal of this case to this Court, reproduced in App. D, *infra*, 79a-81a. This appeal was docketed in this Court within the time permitted by law as extended by order of Justice Blackmun, dated January 23, 1992, and reproduced in App. E, *infra*, 82a. This Court has appellate jurisdiction of this case under 28 U.S.C. § 1253.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory and constitutional provisions involved in this case are § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (as amended in 1982), and the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Section 2 of the Voting Rights Act provides, in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color
>
> . . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment provides, in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of race, color, or previous condition of servitude.

STATEMENT OF THE CASE

Appellants are a class consisting of all black voting-age citizens who reside in the First, Second and Fourth Congressional Districts of Arkansas.[1] They contend that the plan for redistricting Arkansas' four congressional districts to conform to the revised population figures of the 1990 decennial census[2] violates the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.[3] Appellees are the State of Arkansas, its Governor and other state officials who have enacted or who have responsibility for enforcing Act 1220, the redistricting measure to which appellants object.

The General Assembly, on which the Arkansas Constitution places the responsibility for drawing the boundaries for congressional districts,[4] began the redistricting process by adopting House Concurrent Resolution 1006,[5] which established criteria by which redistricting plans would be measured. Those criteria included the standard that equal-

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[1] The District Court certified the class on July 3, 1991.

[2] The 1990 census established that Arkansas' population entitled the state to retain its four congressional districts but revealed shifts in the distribution of the population necessitating the drawing of new district boundaries.

[3] Appellants also contended in the court below that the redistricting plan violated the "one person, one vote" requirement of Article I, § 2, of the Constitution and the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed that claim, see App. B, and appellants do not appeal that decision to this Court.

[4] *See* Complaint, *Turner* v. *Arkansas*, No. LRC-91-295 (E.D. Ark. filed May 17, 1991) (reproduced without its appendices in App. F, *infra*, 83a-95a) at App. F, 87a; Complaint in Intervention, No. LRC-91-295 (E.D. Ark. filed June 18, 1991) (reproduced in App. G, *infra*, 96a-109a) at App. G, 101a.

[5] Reproduced in App. H, *infra*, 110a-12a.

ity of population was to be the goal of congressional reapportionment "insofar as is practicable," App. H, 111a, and accorded a preference to any plan that departed as little as possible from the existing configuration of Arkansas' congressional districts and the maintenance of existing political subdivisions and geographical boundaries. See App. H, 111a. The criteria also stated that "[t]he dilution of voting strength and participation by recognized minorities within the state population is contrary to the Voting Rights Act of 1965, the U.S. Constitution, and the public policy of the State of Arkansas." App. H, 111a. Thus, "any plan or proposed amendment to a plan having the objective of diluting the voting strength of minority citizens shall be unacceptable." App. H, 111a-12a.

Despite objections to continuing the historical dilution of black political power by the fragmentation of black voters among Arkansas' four congressional districts,[6] the Assembly rejected two proposed bills, House Bill 2071 and Senate Bill 721,[7] that would have established a reasonably compact and contiguous congressional district consisting of the "Delta" community of interest.[8] The proposed district

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[6] *See* Transcript of Hearing Before the Redistricting Subcommittee of the Arkansas House State Agencies Committee, at 131-32, 136-37 (Mar. 12, 1991); *see also Smith* v. *Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark.) (three-judge court) (court took judicial notice of history of racial discrimination in electoral process in Arkansas), *aff'd mem.*, 488 U.S. 988 (1988).

[7] Senate Bill 721 was subsequently amended to be identical to House Bill 2071.

[8] Arkansas' Delta, made up of the flatland counties in the eastern and southern parts of the state, is a distinct community of interest. *See Deltaphobia: The Redistricting Game*, Pine Bluff (Ark.) Commercial, Mar. 8, 1991, at A8, col. 2, *quoted in* Affidavit of Jesse Turner, *Turner* v. *Arkansas*, No. LRC-91-295 (July 31, 1991) ("A Delta district taking in the State's black soil, black-people counties would be much truer to the abstract ideal of a cohesive congressional district in terms of population, culture and economics than the current arrangement in which

would have contained a total black population of approximately 42% and a black voting-age population of approximately 38%.

The Assembly instead enacted Act 1220,[9] configured along the lines of the existing districts[10] that had been established by a three-judge federal court in a 1982 malapportionment case, *Doulin* v. *White*, 528 F. Supp. 1323, *remedy adopted*, 535 F. Supp. 450 (E.D. Ark.). Those lines, which antedated the 1982 amendments to the Voting Rights Act, fragmented the black population between the First, Second and Fourth Congressional Districts, see App. F, 89a, 92a, and the Delta community of interest primarily between the First and Fourth Districts. Compare App. J, 118a (Delta encompassed within proposed Fourth District) with App. J, 116a (Delta fragmented among First and Fourth Districts).

Act 1220, which was signed into law on April 10, 1991, by Governor Bill Clinton, perpetuated the pre-existing fragmentation by dividing black citizens in Arkansas into the following districts:

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the Fourth District simply stretches across the bottom of Arkansas without much regard to natural boundaries."); *see also Jeffers* v. *Clinton*, 730 F. Supp. 196, 200 (E.D. Ark. 1989) (three-judge court) (inserting map of Arkansas indicating concentrations of black population and showing black voting-age populations for "an area referred to as the Delta" that is similar to Delta district proposed by House Bill 2071), *aff'd mem.*, 111 S. Ct. 662 (1991).

[9] Act 1220, reproduced in App. I, *infra*, 113a-15a, also is referred to in the record as Senate Bill 691 or the "Dowd-Harriman" plan after its sponsors in the Arkansas Senate.

[10] Maps showing the boundaries of the previous congressional districts, those created by Act 1220 (referred to as "S.B. 691" on the map) and those proposed by House Bill 2071 may be found in App. J, *infra*, 116a-18a.

	Total Black Population	Black Voting-Age Population
District 1, Northeast Arkansas	17.9%	14.8%
District 2, Central Arkansas	17.6%	15.2%
District 3, Northwest Arkansas	1.6%	1.5%
District 4, Southern Arkansas	26.6%	23.7%

Appellants initiated their challenge to Act 1220 in the United States District Court for the Eastern District of Arkansas on May 17, 1991. See App. F. They alleged that Act 1220 was the intentional product of the Arkansas government's effort to perpetuate a history of discrimination in the voting booth and in the political processes in general in Arkansas. See App. F, 88a. Appellants contended that the General Assembly, knowing that black voters in Arkansas were concentrated in the Delta region, perpetuated the dilution of black political strength by adopting a plan that fragmented black voters among the First, Second and Fourth Districts. See App. F, 89a-90a. They asserted that those factors as well as a history in Arkansas of racially polarized voting and the inability of blacks to elect black representatives in Arkansas (see App. F, 92a) established violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

Appellants prayed for an order striking down Act 1220 and adopting a constitutional redistricting plan the same as or similar to one of the bills that the Assembly had rejected, or, in the alternative, directing appellees to devise a constitutional plan that did not dilute minority voting strength. See App. F, 94a-95a.

Intervenors joined the case shortly after it was filed. See App. G. They contended that the political processes

in Arkansas are not open to black citizens, that black citizens continue to bear the effects of pervasive official and private discrimination in Arkansas in such areas as education, employment and health, and that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See App. G, 102a-03a. They complained that Act 1220 was designed to and did fragment the black population of Arkansas among three congressional districts in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. See App. G, 103a, 106a.

On November 15, 1991, the court below granted summary judgment dismissing appellants' and intervenors' Voting Rights Act and constitutional claims. See App. C. The court's opinion was premised on an "overview" of the Voting Rights Act beginning with a quotation from the author's fifty-nine-page dissent in *Jeffers* v. *Clinton*, 730 F. Supp. 196, 226-84 (E.D. Ark. 1989) (Eisele, C.J., dissenting), *aff'd mem.*, 111 S. Ct. 662 (1991), in which a three-judge federal court struck down Arkansas' state legislative districts as violative of the Voting Rights Act after grappling with many of the same issues presented by this case. The court below restated the view of the *Jeffers* dissent that Voting Rights cases are " 'redefining the nature of our democratic form of government, contrary . . . to the Constitution,' " App. A, 9a (quoting *Jeffers*, 730 F. Supp. at 227 (Eisele, C.J., dissenting)). It also quoted at length from "social and political scientists and astute journalist-reporters," App. A, 16a, who, in the court's words, have objected to "maximizing minority office holding" (App. A, 11a) and who have advocated instead "electoral arrangements that deliver the right messages." App. A, 16a. The court below then proceeded to adopt most of the legal theory and analysis rejected by the *Jeffers* majority two years earlier.

The district court focused on a fundamental Voting Rights Act question that is presented by this case, which

it recognized as having been expressly reserved by the Supreme Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986): "whether a minority group that is *not* sufficiently large and compact to constitute a majority in a single-member district has a lawful claim under Section 2 . . . ." App. A, 22a; see also App. A, 29a ("The Supreme Court [in *Gingles*] specifically reserved . . . a question similar to the one at issue in this case."). The court resolved that issue against appellants and intervenors and dismissed the Voting Rights Act claims because "it cannot be shown that it is possible [in Arkansas] to create a 'sufficiently large and geographically compact district' in which black voters could constitute a majority." App. A, 35a (quoting *Gingles*, 478 U.S. at 50).

The court also rejected appellants' Voting Rights Act claims because of the "implications arising out of the third part of the three-part test outlined in *Gingles*." App. A, 35a. Under that test, plaintiffs must show that "the white majority votes sufficiently as a block [sic] to enable it usually to defeat the majority's preferred candidate." App. A, 35a. The court below held that if the appellants in this case were to prove the existence of that condition, they would, because of their limited numbers, *ipso facto* lose for the reason that, "*because of this polarized voting*, they would *not* be able to influence the outcome of an election in their proposed district." App. A, 35a.

The district court also rejected appellants' § 2 claims because Act 1220 constituted "no significant change . . . from the plan adopted . . . in 1982." App. A, 41a. The court reasoned that

> Section 2 only prohibits the imposition or application of any standard, practice or procedure . . . that results in black voters having less opportunity than others to participate in the political process or to elect representatives of their choice. "Less opportunity" by any fair interpretation

> means "less opportunity" than such black voters had immediately before the imposition or application of the challenged standard[,] practice or procedure.

App. A, 41a (footnote omitted). From this premise, the court deduced that § 2 "is not an affirmative action statute" and is therefore not violated by a districting plan, however harmful it might be, that does not itself "dilute black political opportunity." App. A, 42a. "[O]n this basis alone, [appellants] must lose their Section 2 claim." App. A, 42a.

The court erected two additional barriers to consideration of appellants' § 2 claims. First, it interpreted *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), to require claimants to prove *both* less opportunity to participate in the political process *and* less opportunity to elect candidates of their choice. See App. A, 44a-45a. Second, the court held that evidence and repeated judicial recognition of a long history of racial discrimination against blacks in Arkansas, racial bloc voting, an inability of blacks to get elected to congressional office, and reduced opportunities for blacks in employment, education and health were not sufficient to establish that blacks in Arkansas had less opportunity than whites to participate in the political process. See App. A, 48a ("the Senate or *Zimmer* factors cannot suffice for the proof required for Section 2"). Quoting the dissent in *Jeffers*, the court stated that " 'the opportunity of blacks to participate in the political process would be the same regardless of the manner in which the Board drew the district lines.' " App. A, 48a (quoting 730 F. Supp. at 237 (Eisele, C.J., dissenting)).

The court also rejected, apparently on three bases, appellants' claim that the new boundaries were intentionally discriminatory in violation of the Fourteenth and Fifteenth Amendments. See App. A, 52a-62a. It concluded that even in cases of actual discriminatory intent, "actual

discriminatory effect" must be established. App. A, 54a. Appellants' claim failed because "they *cannot* prove, as a matter of law, that regardless of the legislative intent, Act 1220 actually has the effect of discriminating against black voters or dilutes or diminishes their influence." App. A, 55a. Although the court's opinion is somewhat unclear, the absence of sufficient proof of a discriminatory effect was apparently attributed by the court (a) to appellants' inability, discussed *supra* at 9, to show that they were a sufficiently large minority to control the outcome of congressional elections, even under their plans; (b) to the fact, discussed *supra* at 9-10, that the 1991 challenged plan was based upon, and did not constitute a material retrogression from, the "presumptively constitutional" (App. A, 55a) court-imposed 1982 plan; and (c) because appellants failed to meet the "effects test" (App. A, 62a) for intentional discrimination established by this Court for political gerrymandering cases in *Davis* v. *Bandemer*, 478 U.S. 109 (1986) (plurality opinion). See App. A., 56a-62a. On the latter point, the court below expressly cited to and relied on Justice White's plurality opinion in *Davis* that established an "effects test" for political gerrymandering cases, and stated that the appellants here could not meet "this" test. App. A, 62a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Three times within the past ten years,[11] this Court has affirmed judgments by federal courts that have chronicled Arkansas' "long history of invidious discrimination in the election process." *Perkins*, 675 F.2d at 211. As recently as 1988, and again in 1989, this Court upheld three-judge

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[11] *See Perkins v. City of West Helena*, 675 F.2d 201 (8th Cir.), *aff'd mem.*, 459 U.S. 801 (1982); *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), *aff'd mem.*, 111 S. Ct. 662 (1991); *Smith* v. *Clinton*, 687 F. Supp. 1310 (E.D. Ark.) (three-judge court), *aff'd mem.*, 488 U.S. 988 (1988).

federal courts that had declared that "the history of discrimination [in the Arkansas electoral process] has adversely affected opportunities for black citizens in health, education, and employment." *Smith*, 687 F. Supp. at 1317, *quoted in Jeffers*, 730 F. Supp. at 204. Thus, this Court is quite familiar with the fact that "past discrimination has reduced the present opportunity of blacks [in Arkansas] to participate in the political process [and that] the effect[] of [Arkansas'] election laws has been to discourage some blacks from exercising their right to vote today." *Perkins*, 675 F.2d at 211.

Both *Smith* and *Jeffers* expressly admonished that "[w]e do not believe that this history of discrimination, *which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act.*" *Smith*, 687 F. Supp. at 1317 (emphasis added), *quoted in Jeffers*, 730 F. Supp. at 204. This case is an unfortunate reminder that black citizens in Arkansas will, indeed, have to prove again and again the same regrettable history unless and until this Court makes it clear that that unlawful process may not continue.

The questions presented in this appeal are fundamental and the rights at stake are essential. Some of these questions have divided the federal courts; even the federal courts that have adjudicated the federal voting rights of the citizens of Arkansas have issued conflicting and irreconcilable decisions.

I. The Voting Rights Act § 2 Questions

A. Whether Minorities That Cannot Constitute A Majority In A District Have Any Rights Under § 2 Of The Voting Rights Act

The first and perhaps most fundamental Voting Rights Act question presented by this case is the one reserved by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986): "[W]hat standards should pertain to[] a claim brought by a minority group[] that is not sufficiently large and com-

pact to constitute a majority in a single-member district . . . [?]" *Id.* at 46 n.12. While the question was articulated in *Gingles* in the context of an objection to multimember districts, the court below held that the *Gingles* standards apply "to claims where the minority voters challenge the alleged gerrymandering of *single-member* voting districts such as those at issue here." App. A, 30a. As will be discussed, *infra* at 15-16, that question has divided the federal courts that have considered it. Because the question is certain to recur, especially in light of the number of jurisdictions throughout the nation presently engaged in decennial redistricting to conform to the 1990 census under the requirements of the Voting Rights Act, its resolution is essential.

Appellants advocated a redistricting plan that would have consolidated a majority of black voters in Arkansas in one congressional district and remedied their historic fragmentation among three of the four congressional districts. Appellants' plan would have recognized a congressional district, composed to accommodate common geographic and economic interests, that would have consisted of a black population of 42% and a voting-age black population of 38%. That plan was rejected in favor of one that distributed black voters among the four districts with voting-age population concentrations of 14.8%, 15.2%, 1.5% and 23.7%.

Although this Court most assuredly did not decide the question in *Gingles*, the court below nonetheless found that *Gingles* was controlling. Thus, the first *Gingles* " 'precondition,' " that " 'the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district,' " App. A, 28a (quoting *Gingles*, 478 U.S. at 50), was dispositive. The allegation that Act 1220 impaired the power of black voters to "influence" the outcome of elections, where they consisted of 38% of the voting-age pop-

ulation, was held insufficient as a matter of law to state a claim under § 2 of the Voting Rights Act.

Quoting from the decision of the Seventh Circuit in *McNeil* v. *Springfield Park District*, 851 F.2d 937 (1988), *cert. denied*, 490 U.S. 1031 (1989), the court below concluded that

> [t]he "ability to influence" claim would severely undermine whatever good purpose is served by the [*Gingles*] threshold factors. . . . Courts might be flooded by the most marginal Section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections.

App. A, 33a (quoting 851 F.2d at 947).

The court below added that the first and third *Gingles* preconditions operated as a classic Catch 22 to prevent minorities who are not numerous enough to constitute a majority from presenting a viable § 2 claim. See App. A, 35a. Because the third part of the *Gingles* test required appellants to prove that whites voted as a bloc, proving that fact would at the same time prove that blacks would be defeated at the ballot box by the more-numerous bloc-voting whites, thus establishing that they "would *not* be able to influence the outcome of an election in their proposed district." App. A, 35a. Thus, overcoming the third *Gingles* precondition was as fatal to appellants' claim as failing to overcome it.

The impact of the court's reasoning is, of course, devastating to all minorities who are not numerous enough to constitute majorities in a district. Any minority that is not substantial is automatically written out of the Voting Rights Act. The more a group is in need of protection, the further it recedes from rights under the Act. That Orwellian result could not have been contemplated by the

framers of a law intended to protect the voting rights of minorities.

Unfortunately, the court below is not alone in its decision that *Gingles* precludes § 2 influence claims. In *Brewer* v. *Ham*, 876 F.2d 448 (1989), the Fifth Circuit relied on *Gingles* to affirm the dismissal of a § 2 claim for failure to propose a single-member district in which a minority group would constitute a majority of the voting-age population. *See id.* at 451-53. And in *McNeil*, 851 F.2d 937, the Seventh Circuit held that "[i]n view of the [*Gingles*] Court's apparent objective of sharpening section 2's focus, we cannot consider claims that multi-member districts merely impair plaintiff's ability to influence elections. Plaintiff's ability to win elections must also be impaired." *Id.* at 947.[12]

On the other hand, influence claims under § 2 have been recognized by several courts, some of which have expressly distinguished *Gingles*. For example, in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (1990), *cert. denied*, 111 S. Ct. 681 (1991), the Ninth Circuit held that to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength. *See id.* at 770.[13] In

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[12] *See also Skorepa* v. *City of Chula Vista*, 723 F. Supp. 1384, 1386 (S.D. Cal. 1989) ("a minority group challenging an at-large election system [must] prove that it is sufficiently large and compact to form a majority in a district if a single-member district system were used"); *Martin* v. *Allain*, 658 F. Supp. 1183, 1204 (S.D. Miss. 1987) (relying on *Gingles*, court refused to "design single-member districts to raise the black voter percentage by concentrating blacks as much as possible in order to better 'influence' the outcome of the elections").

[13] The *Garza* court also stated that the "showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases." *Id.* at 771. Thus, *Garza* suggests that evidence of the "totality of circumstances" necessary to state a § 2 claim, see *infra* at 21-24, need not be as rigorous if, as in this case, the claimants are able to prove intentional discrimination.

Armour v. *Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the court refused to conclude that "the [Supreme] Court intended the *Gingles* pre-conditions . . . to apply to all Section 2 challenges. Therefore, we do not adopt them for the racial gerrymandering claim at issue . . . ." *Id.* at 1052 (footnote omitted). And in *East Jefferson Coalition for Leadership and Development* v. *Parish of Jefferson*, 691 F. Supp. 991 (1988), *modified*, 703 F. Supp. 28, 706 F. Supp. 470 (E.D. La. 1989), *aff'd*, 926 F.2d 487 (5th Cir. 1991) ("*East Jefferson*"), the court held that plaintiffs may be eligible for relief under § 2 "if they prove that they are politically cohesive, that a majority voting bloc usually defeats [their] preferred candidates, and that they are geographically compact so that a proposed remedy will insure them *equal access* to the political process and provide them the ability to *influence* elections." 691 F. Supp. at 1006.[14]

Those "differing [lower-court] interpretations suggest that, when it comes to defining the meaning of 'political opportunity' and the scope of available relief under section 2, *Gingles* may have created more problems than it resolved." Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. Rev. 449, 464 (1988). *Garza*, *Armour* and *East Jefferson* each distinguished *Gingles* for a different reason. That alone illustrates the confusion that prevails on this important question.[15]

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[14] *See also Solomon* v. *Liberty County*, 899 F.2d 1012, 1018 n.7 (11th Cir. 1990) (holding that blacks that could constitute voting-age majority are eligible for relief under the Voting Rights Act "should not be read to imply an opposite result where blacks do not constitute an outright majority of the voting age population in any district"), *cert. denied*, 111 S. Ct. 670 (1991); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1205 n.4 (5th Cir. 1989) (if no single district with black majority of voting-age citizens could be created, "the district court will have to address the question of whether this situation would defeat plaintiffs' threshold showing or simply affect the remedy to which plaintiffs would be entitled if a violation of section 2 is found").

[15] *See also West* v. *Clinton*, No. 91-2237, slip op. at 6 (W.D. Ark.

Appellants submit that the correct interpretation of § 2 is that it does not deny relief to voters who form only a small part of the electorate. Justice O'Connor's concurring opinion in *Gingles*, joined by Chief Justice Burger and Justices Powell and Rehnquist, seemed to acknowledge the possibility of claims such as the one presented here. Although that opinion disclaimed any final position on the issue, see 478 U.S. at 89 n.1, it did state that

> if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. at 90 n.1. That expression certainly lends support to the view that § 2 protects a minority group's ability to influence the political process and not just its ability, standing alone, to win elections.

The Court's recent opinion in *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), also is consistent with the concept of influence claims. The Court stated that the Voting Rights Act "does not create two separate and distinct rights"; rather, "the opportunity to participate and the opportunity to elect [are] inextricably linked." *Id.* at 2365 (citing *White* v. *Regester*, 412 U.S. 755 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971)). Nothing in *Chisom* was intended by the Court to preclude § 2 claims by small groups. In response to a dissent by Justice Scalia (joined by Chief Justice Rehnquist and Justice Kennedy), the Court stated:

Mar. 12, 1992) (on question of "whether there can be such a thing as an influence claim under Section 2," court observed that "[t]here is authority pointing both ways").

> The dissent argues that our literal reading of the word "and" leads to the conclusion that a small minority has no protection against infringements of its right "to participate in the political process" because it will always lack the numbers necessary "to elect its candidate." *This argument, however, rests on the erroneous assumption that a small group of voters can never influence the outcome of an election.*

Id. at 2365 n.24 (citation omitted) (emphasis added). Thus, six members of the Court in *Chisom* seemed willing to consider with favor the concept that for purposes of § 2, the ability to "influence the outcome of an election" and the "opportunity . . . to elect" are sufficiently intertwined that diluting the power to influence the outcome of elections does indeed diminish both the opportunity to participate and the opportunity to elect.

The *Chisom* Court's recognition of the "close connection between § 2 and § 5 [of the Voting Rights Act]," *id.* at 2367, also reinforces appellants' interpretation of § 2's reach. Among the factors to be considered in reviewing redistricting changes for preclearance under § 5 are "[t]he extent to which minorities have been denied an equal opportunity to *influence* elections," 28 C.F.R. § 51.58(1)(b)(2) (1991) (emphasis added), and "[t]he extent to which minority concentrations are fragmented among different districts," 28 C.F.R. § 51.59(c) (1991). The Attorney General's standards do not require that a protected group be large enough to be able to form a voting majority in any district.[16] Such construction "is entitled to considerable de-

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[16] *See, e.g., Goddard* v. *Babbitt*, 536 F. Supp. 538, 540-41 (D. Ariz. 1982) (Attorney General withheld § 5 preclearance of Arizona state legislative reapportionment plan because it fragmented San Carlos Apache Tribe among three different districts even though tribe's approximately 8,000 members could not constitute voting majority in dis-

ference." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 179 (1985).

The conclusion that § 2 denies relief to members of a protected class of citizens who have been fragmented but who are not sufficiently numerous to constitute a majority in a single-member district would mean that a state covered by § 5 would be precluded from enacting a redistricting plan that would fragment such a group, "whereas a similarly discriminatory system already in place could not be challenged under § 2. It is unlikely that Congress intended such an anomalous result." *Chisom*, 111 S. Ct. at 2367.

B. Whether § 2 Of The Voting Rights Act Applies To Redistricting Plans That Perpetuate Pre-Existing Discriminatory Boundaries

The second Voting Rights Act question is whether § 2 requires plaintiffs to establish that a challenged redistricting plan fragments black voters to a greater extent than under the pre-existing plan. The district court, essentially applying § 5's retrogression standard,[17] held that § 2 required a showing that a redistricting plan resulted in " 'less opportunity' [for the protected class than it] had imme-

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trict of approximately 90,000 persons); Letter from Hon. John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Lester F. Sumners, Esq. (Aug. 2, 1991) (citing *Chisom*, 111 S. Ct. at 2365 n.24) (withholding preclearance because proposed redistricting of supervisor districts in Union County, Mississippi, *inter alia*, failed to create district that would contain "near black population majority," significantly minimizing ability of black voters to participate in political process).

[17] *See* 28 C.F.R. § 51.54(a) (1991) (citing *Beer* v. *United States*, 425 U.S. 130, 140-42 (1976)) ("A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively.").

diately before the imposition or application of the challenged standard[,] practice or procedure." App. A, 41a (footnote omitted). Applying that standard, the court dismissed the challenge to Act 1220 because it constituted "no significant change" from the redistricting plan that went into effect after the 1980 census. App. A, 41a.

The court below cited no authority, and none has been located by appellants, for that novel interpretation of § 2. In this instance at least, the language of Congress could not be more clear: "less opportunity" means "less opportunity than other members of the electorate." 42 U.S.C. § 1973(b). The correct standard by which to compare a minority's voting power under a challenged redistricting plan is the level of opportunity enjoyed by the white majority, *not* the diminished and unjust restrictions that minority voters had experienced under a previous districting plan.

The rationale of the court below would allow states and political subdivisions continuously and knowingly to re-enact with impunity discriminatory standards, practices and procedures. That is not the law Congress adopted.

C. Whether Voting Rights Act Plaintiffs Must Prove *Both* Less Opportunity To Participate In The Political Process *And* To Elect Representatives Of Their Choice

The court below concluded that appellants could not prevail unless they could prove two separate things: that Act 1220 resulted in *both* less opportunity to participate in the political process *and* less opportunity to elect representatives of their choice. That was directly contrary to the decision in *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), affirmed without opinion by this Court, 111 S. Ct. 662 (1991), in which the court explicitly rejected the dual proof standard on the ground that the history of racial discrimination in Arkansas, "much of it official and governmental," 730 F. Supp. at 204, " 'necessarily inhibits

full participation in the political process,' " *ibid.* (quoting *Smith* v. *Clinton*, 687 F. Supp. at 1317), and that the right protected by the Voting Rights Act is "the aggregate of these opportunities—the right to effective participation in the political system." *Ibid.* The court below essentially reversed *Jeffers* and substituted the view of the dissenting opinion in *Jeffers*, *see id.* at 231 (Eisele, C.J., dissenting), on the ground that *Chisom* "resolved [the issue] consistent with the minority's view in *Jeffers*." App. A, 44a (footnote omitted).

The language from *Chisom* on which the court below relied (see App. A, 44a-45a) is *dicta* because the issue in *Chisom* was whether "Congress' choice of the word 'representatives' . . . in section 2(b) is evidence of congressional intent to exclude vote dilution claims involving judicial elections from the coverage of § 2." 111 S. Ct. at 2364. And *Chisom* makes it clear that "any abridgement of the opportunity . . . to participate in the political process inevitably impairs [the] ability to influence the outcome of an election." *Id.* at 2365. "[T]he opportunity to participate and the opportunity to elect [are] inextricably linked." *Ibid.*

As discussed in more detail in part I(D), appellants submit that the dilution of their votes by fragmenting them among several congressional districts in the face of proven racial bloc voting in Arkansas impedes at the same time their ability to participate *and* their ability to elect representatives of their choice. In any event, proof of either of those conditions should entitle them to a Voting Rights Act remedy because Congress did not intend the "dual proof requirement" imposed by the court below.

D. Whether Minorities May Prove Less Opportunity To Participate In The Political Process Through Evidence Of The Congressional Factors

Even if § 2 requires proof of both diminished opportunity to participate and to elect, a fourth question remains: Does § 2 enable plaintiffs to prove that a redistricting plan

results in less opportunity to participate in the political process through evidence of the factors expressly articulated as relevant to that inquiry by the Congress that amended the Voting Rights Act in 1982? The court below dismissed such historical evidence as immaterial: "[T]he Senate or *Zimmer* factors cannot suffice for the proof required for Section 2." App. A, 48a.

Federal courts scrutinizing the history and effect of electoral discrimination repeatedly have accepted evidence such as that offered by appellants to prove diminished participation. See, *e.g.*, *Armour*, 775 F. Supp. at 1049-50; *East Jefferson*, 691 F. Supp. at 996-97. Its existence and impact in Arkansas is so well established that it is accepted as a matter of judicial notice. See *Jeffers*, 730 F. Supp. at 204; *Smith*, 687 F. Supp. at 1317. The decision below to ignore it is inexplicable and utterly without justification.

Congress expressly intended Voting Rights Act claims to be considered "based on the totality of circumstances," 42 U.S.C. § 1973(b), and the factors cited by appellants were among those expressly approved by Congress as pertinent to such claims. See *Gingles*, 478 U.S. at 43. Those factors included, *inter alia*, the following:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> . . . .
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder

> their ability to participate effectively in the political process; [and]
>
> . . . .
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 207 ("Senate Report") (citing with approval *White* v. *Regester*, 412 U.S. 755 (1973)); *see also Gingles*, 478 U.S. at 44-45 (listing factors).

Thus, the evidence and history offered by appellants and intervenors, see *supra* at 7-8, was precisely that which was declared by Congress as not only relevant but central to Voting Rights Act claims. Moreover, federal courts had already determined in 1988 and 1989 in decisions affirmed by this Court that " 'this history necessarily inhibits full participation [by black citizens in Arkansas] in the political process.'" *See Jeffers*, 730 F. Supp. at 204 (quoting *Smith*, 687 F. Supp. at 1317); *see also Perkins*, 675 F.2d at 211 ("this past discrimination [against blacks in Arkansas] has reduced [their] present opportunity . . . to participate in the political process"). Therefore, the conclusion reached by the court below that the *Jeffers* court had "*acknowledged*" that "in Arkansas black voters had as much opportunity in the 1981-1990 period to participate in the political process as anyone else," App. A, 51a (emphasis added), was not only flatly wrong; it was based on a complete misreading of *Jeffers*. The court in *Jeffers* did not "*acknowledge*" any such thing except in the course of reciting the "argument" that had been presented by the defendants. See *Jeffers*, 730 F. Supp. at 204. The *Jeffers* court, as had *Smith* and *Perkins* before it, found exactly the opposite. See *ibid.*

The court below apparently believed that actual proof of direct impairments to the right to register or vote were

required to prove less opportunity to participate in the political process. Section 2, however, "without question is aimed at discrimination that takes the form of dilution, as well as outright denial of the right to register or to vote." Senate Report at 30 n.120. The district court's interpretation would eviscerate the Voting Rights Act.

II. The Constitutional Questions

A. Whether The Constitution Prevents The Intentional Dilution Of Minorities That Cannot Constitute A Majority In A District

Despite allegations that Act 1220 intentionally diluted black voting strength in the First, Second and Fourth Congressional Districts, the court below dismissed appellants' constitutional claims because it found that "they *cannot* prove, as a matter of law, that regardless of the legislative intent, Act 1220 actually has the effect of discriminating against black voters or dilutes or diminishes their influence." App. A, 55a. Although its opinion is unclear, the court apparently based that conclusion, as it had regarding the Voting Rights claims, on the fact that blacks in Arkansas were not sufficiently numerous alone to determine the outcome of elections.

This case, like *Garza*, involves allegations that the legislature knowingly and intentionally fragmented a minority community to assure more safe seats for incumbent politicians. See 918 F. 2d at 778 (Kozinski, J., concurring and dissenting in part) ("elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities"). The court stated in *Garza* that "the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases." 918 F.2d at 771.

Dilution of voting strength has an invidious discriminatory effect whether or not members of a minority are sufficiently numerous to constitute a majority in a district.

In *Garza*, the court found a violation of the Equal Protection Clause even though Hispanics were not sufficiently large to form a majority because "intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect legislators of their choice." *Ibid.* As demonstrated in the foregoing paragraphs, it is beyond peradventure that electoral discrimination has had continuing destructive effects on the rights of black voters in Arkansas. Dilution of their voting strength, if intentional, would constitute a clear constitutional violation.

B. Whether The Constitution Prevents Enactment Of Redistricting Plans That Perpetuate Pre-Existing Minority Vote Dilution

Stating that "[t]he 1982 plan [is] the 'benchmark' for determining whether the 1991 plan, under attack here, diluted black voting power by fracturing black voters into separate districts," App. A, 55a-56a, the court apparently concluded, as it had relative to the Voting Rights Act claims, that Act 1220 had no discriminatory effect for the simple reason that "there was no significant change in 1991 from the plan adopted and approved by the Court in 1982." App. A, 41a. The lines drawn by Act 1220, however, constitute an intentional effort to perpetuate the fragmentation of black political strength. The fact that those lines were patterned after lines drawn by a court a decade earlier that was considering only numerical equality and not racial discrimination, see *Doulin*, 528 F. Supp. at 1326, is without relevance.

The court declined to require Arkansas to bring an end to its discriminatory districting system because it perceived no constitutional responsibility for Arkansas to take "affirmative" measures to rectify any evils in a system based on a 1982 "court-imposed," "presumptively valid" plan. App. A, 55a. The fact that a court had imposed the 1982

plan, and that the passage of time prevented anyone from challenging it, "insulate[d] the state from any allegation that the 1982 . . . districts were enacted with an *intentional* racial prejudice." App. A, 55a. The court's reasoning is factually off the mark because it misapprehends appellants' allegations concerning intentional perpetuation of vote dilution and legally unsupportable because it presupposes that states can intentionally re-enact discriminatory districting systems. See, *e.g.*, *Lockhart* v. *United States*, 460 U.S. 125, 138 (1982) (Marshall, J., concurring in part and dissenting in part) ("Congress intended § 5 [of the Voting Rights Act] to prohibit the covered jurisdictions from adopting voting procedures which perpetuate past discrimination").

C. Whether The Constitutional Standards For Political Gerrymandering Apply To Claims Of Racial Discrimination

The third error made by the court below in dismissing appellants' constitutional claims was its unaccountable application of the "effects test" (App. A, 62a) for political gerrymandering cases established in *Davis* v. *Bandemer*, 478 U.S. 109 (1986) (plurality opinion), to a case of racial gerrymandering in which fundamental rights are at issue. See App. A, 56a-62a. *Davis* is completely distinguishable from this case because, as the district court recognized, it involved a "challenge to the 1981 Indiana state legislative apportionment based on the ground that the law unconstitutionally diluted the votes of *Indiana Democrats*." App. A, 56a (emphasis added). Application of a more rigorous standard of proof to claims of intentional discrimination against political parties may be warranted because political parties simply are not perceived as requiring the heightened level of protection afforded to racial minorities by the Constitution. As Justice O'Connor stated in her concurrence in *Davis*, "If members of the major political parties are protected by the Equal Protection Clause from the dilution of their voting strength, then members of

every identifiable group . . . should be able to bring similar claims." 478 U.S. at 147, *quoted in* App. A, 61a.

The standard that the district court should have applied to the claims that Act 1220 intentionally diluted black minority voting strength in Arkansas was the one set forth by this Court in *White* v. *Regester*, 412 U.S. 755 (1973). See *Garza*, 918 F.2d at 771 (applying *White* standard to determine whether intentional fragmentation of Hispanic community had discriminatory effect). *White* involved a challenge to multimember districts in two Texas counties that the Court found had invidiously discriminated against racial or ethnic groups. To find that the multimember districts had a discriminatory effect, the Court required proof that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766 (citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 149-50 (1971)).

The *Davis* v. *Bandemer* test has been perceived as imposing very high thresholds for political gerrymandering cases. See, *e.g.*, Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1328 (1987) ("the [*Davis*] Court's intention—evident in the standard that it announced for evaluating future challenges to districting plans—[was] to invalidate only egregious gerrymanders"). Appellants are aware of no cases, and the court below referred to none, that would impose those requirements in a case of intentional racial discrimination in the drawing of election districts. The Court should erase this clearly erroneous misapplication of *Davis* v. *Bandemer*.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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April 8, 1992

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CIVIL No. LR-C-91-295

JESSIE TURNER; CHRISTINE BROWNLEE; JACK FOSTER; ALAN SMITH; AND FREDDIE LYON
PLAINTIFFS

V.

THE STATE OF ARKANSAS; BILL CLINTON, Governor of the State of Arkansas; WILLIAM J. McCUEN, Secretary of State of the State of Arkansas; JOHN M. LIPTON, Speaker of the Arkansas House of Representatives; and JERRY P. BOOKOUT, President Pro Tempore of the Arkansas Senate
DEFENDANTS

Submitted: August 12, 1991
Filed: November 15, 1991

Before, Theodore McMILLIAN, Circuit Judge, G. Thomas EISELE, Senior District Judge, and Henry WOODS, District Judge.

WOODS, District Judge, concurring.

McMILLIAN, Circuit Judge, concurring in result and Judgment only.

EISELE, Senior District Judge.

MEMORANDUM OPINION AND ORDER

Defendants' motion to dismiss or alternatively for summary judgment is before the Court. This is a voting rights case in which a three-judge court has been appointed. For the reasons discussed below, the Court will grant in part and deny in part the motion for summary judgment.

There are three issues. First, this Court has been asked to decide whether the State of Arkansas, its governor and legislature violated the Fourteenth and Fifteenth Amendments to the Constitution when it enacted legislation aligning and redistricting the four congressional districts in the state. Second, this Court has been asked to decide whether the same legislation violated Section 2 of the Voting Rights Act. Finally, this Court must decide whether that legislation resulted in an unconstitutional malapportionment of the population in violation of the "one person, one vote" standard. The Court will first consider the Voting Rights Act question, followed by a discussion of the Fourteenth and Fifteenth [A]mendment questions and, finally, the one person, one vote issue.

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I. BACKGROUND

The Arkansas Legislature passed Act 1220 in the 1991 legislative session. The Act provided for the redistricting of the Congressional Districts in the State of Arkansas to conform to the revised population figures of the 1990 Decennial United States Census. Governor Bill Clinton signed the bill into law on April 10, 1991.

Act 1220, also referred to as Senate Bill 691, or the "Dowd-Harriman" plan (after its sponsors in the Arkansas State Senate) split the state into four separate districts: Pulaski County and the surrounding counties generally form a district as the central hub of the state, District 2. The other three districts complete the wheel around the hub: District 1 is in northeast Arkansas; District 3 is in northwest Arkansas; and District 4 is in what might appropriately be termed the southern part of the state.

The apportionment plan enacted by the legislature and signed by the governor follows closely the apportionment plan designed and implemented by this Court in 1982. *Doulin v. White,* 535 F. Supp. 450 (E.D. Ark. 1982) (malapportionment case). The legislative history to the 1991 Act and Act 1220 itself show that the Arkansas legislature gave preference to plans that departed as little as possible from the remedy implemented in *Doulin. See* paragraph 3 of House Concurrent Resolution 1006 (February 4, 1991), attachment 5 to defendants' motion, which states, *inter alia,* that preference shall be given "to a plan which departs as little as possible from the 1981 apportionment plan as developed by the Court in *Doulin v. White,* so long as such plan is otherwise constitutionally acceptable."

Plaintiffs' challenge is to the new 1991 districting plan. That plan was made necessary only because of relatively slight population shifts. The following shows the total pop-

ulation and the total black[1] population figures for the 1982 *Doulin* created districts based on the 1980 census and also the 1990 census figures for the same (1982) congressional districts:[2]

NUMBER AND PERCENT BLACK IN CURRENT CONGRESSIONAL DISTRICTS (1982 BOUNDARIES): 1980 POPULATION AND 1990 POPULATION

DISTRICT	1982 BOUNDARIES WITH 1980 POPULATION		
	Total	Black	Percent
First	573,551	107,604	18.8%
Second	569,116	95,739	16.8%
Third	572,937	11,794	2.1%
Fourth	570,831	158,631	27.8%
	2,286,435	373,768	16.3%

DISTRICT	1982 BOUNDARIES WITH 1990 POPULATION		
First	555,487	101,702	18.3%
Second	612,672	106,931	17.5%
Third	632,411	13,391	2.1%
Fourth	550,155	151,888	27.6%
	2,350,725	373,912	15.9%

It will be seen that, during the decade, the overall state population increased 64,290 or 2.8%. The great bulk of that increase (59,474) was in the Third Congressional Dis-

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[1] The original plaintiffs refer to themselves as "blacks." The Walker intervenors consistently use the term "African Americans." The Court is sensitive to the nuances involved but has chosen to use the term "blacks" throughout this opinion, thus, in effect, letting the original plaintiffs establish the appropriate protocol. The Court trusts that no one will be offended by the adoption of the convention.

[2] All of the figures used in this opinion have been stipulated by the parties or have been derived by mathematical computations based on those stipulated figures.

trict, which has a black population of approximately 2%. And the pleadings make it clear that the Third Congressional District does not really come into play in the lawsuit. The Complaints of the plaintiffs and of the black Intervenors refer to, and complain about, the First, Second and Fourth Districts. See paragraphs 24, 28, 32(d), 32(e), 32(g), and 33 of the Complaint and paragraphs 40, 46, 47 and 50 of the Complaint in Intervention. The total increase in the combined population of those three districts from 1980 to 1990 is 4,816 or 0.2%. However, among those three districts, the First decreased 18,064 or 3%; the Second increased 43,556 or 7.7%; and the Fourth decreased 20,676 or 3.6%. The racial mix in the three districts changed very little between 1980 and 1990: the First went from 18.8% black to 18.3%; the Second from 16.8% to 17.5%; and the Fourth from 27.8% to 27.6%.

Of the total population of Arkansas in 1991 (2,350,725), 373,912 persons, or 15.9%, are black. This is down from 16.3% in 1980. The number of blacks of voting age, however, is 237,502 which is only 12.73% of the state's total voting age population.

Under Act 1220 of 1991 the black percentage of total population in the three implicated districts changed as follows:

	1980 BOUNDARIES		1991 BOUNDARIES
	1982	1991	1991
First	18.8%	18.3%	17.9%
Second	16.8%	17.5%	17.6%
Fourth	27.8%	27.6%	26.6%

The voting age figures for blacks changed as follows:

	1980 BOUNDARIES		1991 BOUNDARIES
	1982	1991	1991
First	15.6%	15.3%	14.8%
Second	14.5%	15.1%	15.2%
Fourth	24.6%	24.7%	23.74%

To meet a theoretically perfect "one person one vote" test, the First District would need to gain 32,194 persons; the Second would have to lose 24,991 persons; the Third would have to lose 44,730; and the Fourth would have to gain 37,526.

This, then, is the factual situation which confronted the Arkansas Legislature (the "General Assembly") when it took up the redistricting issue in 1991.

The legislature obviously used the *Doulin* Court's plan as a starting point when it formulated Act 1220. The two plans are markedly similar. The differences between the two plans may be quickly summarized: by virtue of the 1991 Act, District 2, at the center of the state, gained Van Buren County, with a 1990 population of 14,008, from District 1 in the northeast corner; District 2 lost Lonoke County, with a 1990 population of 39,268, to District 1; District 2 therefore had a net loss of population to District 1. District 3 lost four counties and District 4 gained three counties. In the northern part of the state, District 3 lost Searcy County, with a 1990 population of 7,841, to District 1. In the southern part of the state, District 3 lost three counties to District 4: Howard County with a 1990 population of 13,569; Montgomery County with a 1990 population of 7,841; and Sevier County with a 1990 population of 13,673. In summary, a total of six counties with an aggregate 1990 population of 96,164 were changed and moved about among the various districts. The same values

that the Court in *Doulin* found appropriate are preserved by Act 1220.[3]

The 1990 population of the state was 2,350,725. The theoretical population of each congressional district that will assure a mathematical "one person one vote" result is therefore 587,681, or one-fourth of the total population of the state. The populations of the congressional districts as mandated in Act 1220 are as follows: District 1, northeast Arkansas: 588,588; District 2, Pulaski County and central Arkansas: 587,412; District 3, northwest Arkansas: 589,523; District 4, south Arkansas: 585,202. The total variance from the ideal size is therefore .73%.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."

In *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), the United States Supreme Court stated that "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 3187 (quoting *Celotex v. Catrett*, 477 U.S. 317, 323 (1986)). The *Lujan* Court further stated that

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[3] HB 2071 favored by the plaintiffs and the black intervenors would constitute a radical departure not only from the *Doulin* plan but from all previous congressional redistricting plans in that it would split counties and cities. It would create a district stretching from the northeast corner of the state to the southwest corner. It would change the representation of over 750,000 people in more than twenty counties.

where the nonmoving party will carry the burden of proof at trial, "Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case." *Id.*

Once a party has carried its burden under Rule 56, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 586 (1986). "[T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P 56(e). Although the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the summary judgment motion, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), this does not mean that the nonmoving party may simply rest upon general allegations in the complaint or assertions that there exists a genuine issue of fact. *See Lujan*, 110 S. Ct. at 3188.

III. OVERVIEW AND CONTEXT OF CENTRAL ISSUES

What was said in *Jeffers v. Clinton*, 730 F. Supp. 196, 227 (E.D. Ark. 1989) (Eisele, C.J., dissenting) applies equally here:

> It is my view that many Voting Rights cases, such as this one, are changing the political landscape of America in fundamental ways without legislative mandate and without the benefit of scholarly legal and political discourse. In so doing these cases are, in an almost inadvertent manner, redefining the nature of our democratic form of government, contrary, I believe to the Constitution.
>
> Do we really believe in the idea of one political society or should this be a nation of separate racial, ethnic, and language political enclaves? Surely such issues are worthy of serious, focussed debate and discussion. Ironically, there has been precious little of either.

This case carries the effort to concentrate black voters into fewer and fewer districts a step beyond that already taken in *Jeffers v. Clinton.*[4] If successful, it would leave our nation but one short step removed from a system of representative government based on race, ethnic origin and language, (is religion next?), in which system district lines would be irrelevant. We would then end up with a system of pure proportionate representation predicated upon factors that *should be* completely irrelevant in the political life of a democratic society. But it is not necessary to take that additional step in order to end up with a system of proportionate representation based on race. The *Jeffers* rationale, if permitted to stand, will bring us close to that end and plaintiffs' success here would, for practical purposes, complete the process.

Cases such as this thrust us into the political thicket. There is no reason to deny this reality. We must search for a principled context for guidance. Revitalization of Section 4 of Article IV of our Constitution, the guarantee of a Republican Form of Government, has been suggested.[5] In any event we must recognize that traditional narrow legal principles must yield to larger legal-political considerations, for we are dealing with the essence of our democratic society. We do not, therefore, hesitate to cite those outside the legal community who have given thought to these issues.

Ms. Abigail Thernstrom has written with insight in the area. In her book, *Whose Votes Count?*, she states:

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[4] *Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989), 740 F.Supp. 585 (E.D. Ark. 1990). *Jeffers* required the creation of almost as many super-majority black state legislative districts as it was possible to create in the state of Arkansas. This case seeks the creation of a "superminority" black district when there are not enough black voters to constitute a majority district.

[5] See *Jeffers*, 730 F. Supp. 196 at 232-239.

> It might be said that blacks in *every* jurisdiction benefit from having their own in office. However, that is an argument not for federal intervention but for black political organization. "The extension of trust or 'friendship' beyond the family and of citizenship beyond race, ethnicity, and religion, is a significant political achievement," Michael Walzer has written. "I think," he adds, "we will want . . . to limit the ways in which group membership counts as a qualification for office, much as we limit the ways in which blood relationship counts, and for similar reasons." In amending section 2, [of the Voting Rights Act] Congress unequivocally and wisely rejected the notion of group entitlement to even one legislative seat.
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> * * * *
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> Perhaps the most important [cost attached to maximizing minority office holding] is the danger that categorizing individuals for political purposes along lines of race and sanctioning group membership as a qualification for office may inhibit political integration. As James Blumstein argued at the 1982 Senate hearings, such categorization amounts to a racial "piece-of-the-action approach," perhaps freezing rather than thawing the previous system of racial politics. The heightened sense of group membership works against that of common citizenship. And as Donald Horowitz pointed out at those same hearings, ethnic boundaries, by diminishing the sense of common citizenship, may "ultimately smother democratic choice and threaten democratic institutions.["]

This same point was made again very recently by Mr. Stuart Taylor, Jr. in "Voting By Race", *American Lawyer*, June 1991, *Id.* at p. 50, 51:

> More fundamentally, these developments raise the question whether some voting rights suits and remedies now being pursued around the country may—in

> the long run—do more harm than good, by spurring politicians to appeal only to members of their own race, and by putting the law's imprimatur on the notion that it's only natural to vote along racial lines.
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> * * * *
>
> Are voting rights suits entrenching separate-but-equal elections as a permanent feature of the American landscape? Are they institutionalizing the kind of racially polarized politics we should be trying to get away from? Might they leave minorities and their representatives isolated?
>
> * * * *
>
> Almost every step that has been taken down this road has a certain logic. But with each new step—with almost no public debate—we seem to be perpetuating racial divisions by carving a principle of racial separation into our electoral system.
>
> * * * *
>
> The net long-term effect of creating as many black- and Hispanic- majority voting districts as possible could be to reduce black and Hispanic voters' influence over policy makers generally, by leaving many white officeholders with little incentive to court them.

And in August, 1991, Mr. Charles Lane, a general editor of *Newsweek*, wrote about the districting process used in developing New York City's plan for 51 new city-council districts:

> Above all, the New York districting battle is a case study in how the Voting Rights Act, once one of the most potent weapons in the battle to overthrow segregation in the South, has come to be a tool to institutionalize racial separatism in American politics.

* * * *

> This superficially progressive policy places a different value on the races for purposes of representation. It subtly sanctions the notion that minorities need only aspire to a second-class level of political awareness and activity. Rather than strengthening minority political power, the system arguably undermines it by confining minority influence to a single, concentrated area. And safe race-based districts, in which candidates need only take account of the interests of their own group, are a potential breeding ground for extremists of all races.

Mr. Lane next described the overt political in-fighting involved in developing the New York City redistricting plan. He then observed:

> Those deliberations took place in an atmosphere of jarringly frank racial politics. Members referred to one another by group, as in "the African-American commissioner" or "the Asian-American commissioner." Blacks who lived outside planned black districts were referred to as "wasted." The "wasted" blacks in a housing project in upper Manhattan were "exported" from a "Dominican district" and "imported" to a black district nearby. The switch left the black district looking like a giant crab claw, pinching each side of the Latino zone. Greeks in Queens briefly pressed a claim before the commission. A disabled man presented a map purportedly showing concentrations of disabled voters. At one hearing, a "Latino of African-American descent" demanded the whole commission resign. These pleas were ignored. But the commission did create a Manhattan district designed to elect an openly gay or lesbian candidate.

The New Republic, p. 15.

And then on September 10, 1991, Mr. Lane revisited the issue, this time writing in *New York Newsday:*

> The districting deliberations were not only a battleground for racial and ethnic turf wars, but an illustration of a national trend that has accelerated as states redraw political lines to account for the 1990 Census: The Voting Rights Act, once instrumental in overthrowing political apartheid in the South, is becoming a tool in the racial balkanization of American politics.
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> * * * *
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> In effect, the federal legal system is imposing proportional representation, enshrining the notion that each racial group in America has a right to a quota of seats in government.
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> * * * *
>
> Concentrating voters by race also increases the likelihood that candidates of all races will appeal only to members of their own group, thus fostering extremism—and reducing the possibilities for multiracial coalitions. Instead of "empowering" minorities, the emerging system may weaken them, by confining their influence to a single area rather than permitting them to function as a "swing" vote in several districts.
>
> * * * *
>
> At least one key civil rights leader, John Jacob, executive director of the National Urban League, believes it is time to reassess federal voting rights policies.
>
> "We have to ask if this isn't a new form of political apartheid—assuring some safe congressional seats for blacks at the cost of losing influence with legislators from adjoining districts," he told the group's annual conference in Atlanta last July. "Strategies that made

sense when we just got the vote may not be the best strategies for leveraging our influence on issues that require broad legislative coalitions."

New York Newsday, p. 40, 78.

Ms. Thernstrom, writing about legislative redistricting in the *Washington Post* on September 23, 1991, states:

> Does fair representation demand such a system of reserved seats for separate castes? Only if America is a caste society composed (in effect) of separate nations defined by race and ethnicity.
>
> * * *
>
> It is a vision of America deeply at odds with that upon which the civil rights revolution was built. Justice Department policy . . . represents a sad betrayal of what the civil rights movement should stand for—a commitment to an integrated society, a society in which the horizons of trust extend beyond our racial and ethnic groups, a society in which the ties that bind us reach across racial lines.
>
> * * *
>
> Dunne [the Assistant Attorney General for civil rights in the Justice Department] argues that in insisting on legislative quotas—race-based gerrymandering to protect black candidates from white competition—he is only enforcing the law. But Congress never envisioned the 1965 Voting Rights Act as an instrument for apartheid. Neither the original act nor its subsequent amendments were supposed to force jurisdictions to create a Jim Crow system of elections—districts of whites and districts for blacks. Dunne [the Assistant Attorney General for Civil Rights in the Justice Department] is rewriting the law to conform to black separatist notions that can only work to harden the racial and ethnic lines that already divide us.

> Race may still have much to do with the way people vote. Often too much. But we build the expectation of racial separation into our basic political structure at our peril. Reality is not perfect, but our principles should remain so. We need electoral arrangements that deliver the right messages.
>
> And the right messages are: that we are all Americans, that we're in this together, that the government thinks of us and treats us as individual citizens with individual (not group) rights, that whites can represent blacks and blacks can represent whites, that we have no need for legislative quotas since distinct racial and ethnic groups are not nations in our society and that race does not and should not define the content of our character, political or otherwise.
>
> The message that we deliver in our public policies are [sic] important. They help to shape the society. And the messages I urge square with the intent and language of the law.

Washington Post, p. A.11.

It is unfortunately true that there is a dearth of legal scholarship in this area. But at least some social and political scientists and astute journalist-reporters have been observant enough, and sensitive enough, to note what we are about here. We do not hesitate to cite their observations in what, after all, is an area—political life—where all, and none, are experts.

The idea that race or ethnicity, or language, or religion might become the basis for distributing voters during the periodic redistricting processes runs counter to our professed belief in the "oneness" of American political life and to the belief in Democracy itself with its emphasis on the individual citizen. There is no one coherent political philosophy, political principle or political program subsumed under such group labels as "black citizens," "white

citizens," "Asian citizens," or "Hispanic citizens."[6] Historically we Americans have opted to pursue the ideal of equal political opportunity for each individual citizen. The standard is "one person, one vote." When we speak in terms of "group political rights" for such categories of voters we are immediately in deep water, for so much of real political significance may be hidden under such group labels. Do we not denigrate the importance of the individual, and that individual's independent, complex, political views, when we, on the basis of skin color alone, casually lump him or her into some "cohesive" group during the redistricting process? As Ms. Thernstrom observed in the article on redistricting in the *Washington Post* on September 9, 1991, *supra*, the policy of the civil rights division of the Department of Justice requiring districting plans to provide the maximum number of safe black legislative seats,

> . . . violates basic democratic premises about the fluidity of the categories into which voters put themselves—the different emphases they place on their racial, ethnic, religious, class, gender and other identities. Individual citizens in our society are supposed to choose how they think of themselves, and those choices will often vary from election to election. Depending on the issues, in one election I may think of myself primarily as a female voter and in another as a surburbanite [sic]. In pasting racial and ethnic labels on voters and assuming that only racial identity counts for purposes of districting and other electoral arrangements, the Department of Justice substitutes a rigid system of group rights for that of individual representation.

Washington Post, p. A.11.

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[6] This is not to deny the values of cultural, ethnic and language traditions *within* the oneness of our political and economic lives. On the contrary, *E Pluribus Unum*.

The only political unit in our democracy that has any consistent coherency or integrity is the individual citizen voter.

In redistricting cases we seek to determine if there has been any denial or abridgement of the "right to vote" of "any citizen of the United States." Groups, whether racial, ethnic, language or religious, do not have the right to vote. But, although sad, it is nevertheless true that individuals, solely because of their identification with some racial, ethnic or religious group, are still discriminated against in this country. But how does one deal with this problem in the political arena? Is it by segregating and isolating such groups as was ordered in *Jeffers* and as is being sought here?[7]

The majority in *Jeffers* stated:

> White voters, in short, can elect white candidates against black opposition, but black voters cannot elect black candidates against white opposition, with insignificant exceptions. We hope the day will come when this is no longer true, when voters of both races will vote for the person and not for the color of his or her skin.

730 F. Supp. at, 209.

We share this hope, but we believe the ruling and the remedy of the Court in *Jeffers* will substantially delay, and perhaps even prevent, the realization of that hope.

The only justification for using race, or ethnicity or language as a basis of political segregation is that the law

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[7] To help put the issues here in proper perspective we ask: would an act of a state legislature which *required* the apportioning authority to create as many black and language super-majority districts as possible, and then to pack the remaining black and language minorities in as many "superminority" districts as possible, withstand a federal constitutional attack? See discussion below under Section VI, *Intentional Racial Discrimination.*

requires it. And when does the law require it? This opinion will attempt to answer that question.

IV. A TOUCH OF POLITICAL REALITY

Under current realities the "black influence district" which plaintiffs seek here will not be a "safe black district" but, it will be a "safe Democratic Party district." And yet no one has intervened in this case to oppose this result on behalf of the Republicans (black and white) in the proposed Fourth District. Indeed, the Republican Party is here identifying itself with the black plaintiffs' interest. The unspoken assumption is that the Republicans in the proposed Fourth District will sacrifice their own political interest (wresting this seat from Democratic control) in favor of the larger objective of the Republican Party, i.e., to gain strength in the other two implicated congressional districts.[8] But we do not really know what the Republicans (black or white) in the proposed Fourth District think about plaintiffs' plan any more than we know what the blacks in the First and Second District think about it. Why? Perhaps because neither group is really aware of, or understands, this proposal. And they may not reach such an understanding unless and until that plan is placed into effect by this Court. Such is one of the dynamics of these redistricting cases. The adversarial system does not work too well in this type of litigation because of the absence of adequate notice to affected parties and also because of the mixed motives and interests of the actual parties and the sponsors of such litigation.[9] As stated by Ms. Thernstrom:

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[8] More idealistically it must also be acknowledged that the Republican Party in Arkansas, by finding common cause with black supporters of this "black influence" district, is, in the best of political traditions, attempting to convert black Democrats to the Republican Party.

[9] Another illustration of this non-partisan political phenomenon may possibly be found in the decision of the defendant Democratic office

Republicans have an additional reason for overlooking racial gerrymandering that benefits black candidates: what is good for black candidates is often good for Republicans. As blacks are drained from white districts, the latter become fertile ground for conservative candidates. In Jefferson County, Alabama, an out-of-court settlement in 1985 replaced an at-large system—under which only whites had been elected—with five single-member districts. Two safe black districts were created, leaving three that were almost completely white, and the Republicans benefited from the change. Unless unopposed, Democrats could not win in districts that contained few blacks, and in 1986 two Democratic incumbents lost.

The Jefferson County story was not unique. As a consequence of a compromise reached by South Carolina and the Department of Justice (joined by the NAACP), the state increased the proportion of black voters in two senatorial districts. In the 1984 election, in four districts from which blacks had been drained, conservative Republicans replaced incumbent liberal Democrats. In *Gingles,* the North Carolina case, state

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holders (constituting the State Board of Apportionment) to abandon in favor of the successful black plaintiffs the "preclearance" issues on appeal to the U.S. Supreme Court in the *Jeffers* case thereby depriving the people of Arkansas and the Arkansas General Assembly of the opportunity for a definitive ruling on the legality and constitutionality of the Court's chilling holding "that any further statutes, ordinances, regulations, practices or standards imposing or related to a majority-vote requirement in general elections in this State must be subjected to the preclearance process." *Jeffers,* 740 F.Supp. at 601. The defendants' concession might well make sense to a sensitive, concerned and accountable politician. But who is there to stand for the vindication of the right of people of Arkansas to decide when and if to impose a majority-vote requirement in its general elections without having to seek the permission of a federal court? The failure of the defendants to pursue the appeal has left a permanent cloud over the state's right to extend the principle of majority rule.

> Republican leaders openly acknowledged the "happy coincidence" between the interests of blacks and Republicans. Indeed, they had much to celebrate. Following the district court decision, the North Carolina general assembly created thirty-one single-member districts out of eight that had been multimember. In 1984 the new districting helped Republicans double their share of state legislative seats. Ironically, it was the Democrats—usually quick to charge the Republicans with lax civil rights administration—who were unhappy. Safe black districts, they said, isolate black voters and deprive liberal white Democrats of crucial black support.
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> Thernstrom at 234.

All of which would be irrelevant if the plaintiffs and intervenors would be entitled, upon proof of the facts alleged in their Complaints, to the relief sought. In other words, if, under the Voting Rights Act or the Constitution, the plaintiffs and intervenors in this case were entitled to the relief they are seeking, the negative consequences that would follow from that result would not constitute a basis for the denial of such relief. But this overview is important because plaintiffs and the black intervenors contend this result is what the Congress mandated and intended when it amended Section 2. They also contend that the Fourteenth and Fifteenth Amendments to the Constitution require the creation of such an "influence" district upon proof of the facts alleged in their Complaints. Certainly the consequences of such interpretations must be weighed in assessing the merit and reasonableness thereof.

V. VOTING RIGHTS ACT CLAIM

Plaintiffs claim that the reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. Sec. 1973, as amended in 1982. The basis of plaintiffs' claim is that the new congressional district boundaries "dilute black vot-

ing strength . . . with the effect . . . of giving the black citizens of this state less opportunity than other members of the electorate to elect representatives of their choice."[10] Complaint at 10.

This case raises, *inter alia,* an issue similar to the one reserved by the Supreme Court in the seminal case analyzing the 1982 amendments to Section 2, *Thornburg v. Gingles,* 478 U.S. 30, 46 n.12, 106 S. Ct. 2752, 2764 n.12 (1986), to wit: whether a minority group that is *not* sufficiently large and compact to constitute a majority in a single-member district has a lawful claim under Section 2 for the creation of a "superminority" district as prayed for in the Complaint. This Court concludes that, under the undisputed facts and circumstances of this case, plaintiffs and plaintiff-intervenors have no actionable claim for such relief.

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[10] The Complaint in effect alleges that the redistricting plan established by Act 1220 of 1991 affects adversely the group rights of "the black citizens of this state." This is a statewide attack on the redistricting plan rather than a district by district attack. Black plaintiffs residing in the non-"influence" districts (the First and Second Districts) are not complaining about the loss of black influence in their districts which would result if plaintiffs' plan were adopted. And no other contrary thinking black residents from those "non-beneficiary" districts have asked to intervene. In any event the challenges being made here are not "district-specific". *Thornburg* discusses this problem as does the dissent in *Jeffers.* See *Jeffers,* 730 F. Supp. at, 241-243, 249-250, 265-266 (Eisele, C.J., dissenting). Plaintiff's [sic] theory appears to be that black citizens *statewide* constitute a politically cohesive group and share a common interest in creating one district with the maximum numbers of black voters possible and that black voters "left behind" in the other districts where their numbers would be greatly reduced would simply not complain about the dilution of their influence i.e. those black voters "wasted" (to employ the terminology used by New York City Redistricting Commission) or "left behind" would under this theory be deemed to have willingly sacrificed their personal political self-interest in order to achieve the perceived larger group goal.

A. SECTION 2 AND THE "PRECONDITIONS" OF *THORNBURG V. GINGLES*

Before its amendment in 1982, Section 2 of the Voting Rights Act of 1965 provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right to any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1981). As a result of the 1982 amendment, Section 2 now reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(s) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have

> members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1991 Supp.) (Emphasis in original).

The 1982 amendment rejected the position of the plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that the 1965 Voting Rights Act required a showing that the contested electoral practice was adopted with the *intent* to discriminate against minority voters. The 1982 amendment replaced the "intent" test with an earlier test, from *White v. Regester*, 412 U.S. 755 (1973), focusing on the *impact, result,* or *effect* of the contested structure or practice on minority electoral opportunities. So proof of an intent to discriminate under the current version of Section 2 is not required. Indeed, under a literal reading of the current version of Section 2, if there is present an intent to discriminate which does not *result* in any discrimination, or have any discriminatory effect, the statute would not appear to come into play because, simply, that intent would not "result in the denial or abridgment" of anyone's rights. As stated by Justice Scalia in his dissent in *Chisom v. Roemer*, ___ U.S. ___, 111 S. Ct. 2354, 2369-70 (1991):

> As currently written, the statute proscribes intentional discrimination only if it has a discriminatory effect, but proscribes practices with discriminatory effect whether or not intentional.

Before analyzing a case under Section 2 it is important to take a "walk through that statute" as was done in *Jeffers*. Although we believe the meaning and interpretation of Section 2 as applied to this case is clear, we recognize the convoluted grammatical arrangement thereof requires the reader to carefully follow the succession of phrases by which the statute reinterprets itself.

Subsection (b) of Section 2 makes it clear that the operative provisions of Section 2 are contained in subsection

(a). In other words, the question always is whether the challenged standard, practice or procedure . . . violates subsection (a). We know this because subsection (b) merely refers back to subsection (a) by use of the following introductory language: "A violation of subsection (a) is established if . . . ." So the basic question which courts are asked to answer in applying Section 2 is whether the [standard, practice or procedure] is being imposed or applied "in a manner which results in a denial or abridgement of the right to any citizen . . . to vote on account of race . . ." If it is decided that the challenged [standard, practice or procedure] does not result in a *denial* of the right of any citizen to vote on account of race, then the court must determine whether that [standard, practice or procedure] results in an "*abridgement* of the right of any citizen to vote on account of race." In this context, it is assumed that "abridge" would mean to curtail, limit, or burden. In any event, we are dealing with *the right to vote*, either its denial or its curtailment or limitation.

As pointed out above, subsection (b) of Section 2 identifies what is necessary to establish a violation of subsection (a). Of course, it is assumed that there should be some logical nexus between the showing identified in subsection (b) and the "denial or abridgement" language of subsection (a). According to subsection (b), a denial or abridgement of the right to vote "is established if . . . it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of . . ." a protected class.

It is easy to determine whether a [standard, practice or procedure] *denies* any citizen the right to vote. If not, subsection (b) states that a showing that the "political processes" are not "equally open to participation," because of the challenged [standard, practice or procedure], would nevertheless be adequate to establish that the [standard, practice or procedure] *abridged* the right to vote. So we look at the [standard, practice or procedure] and determine

if it has resulted in the political process "not being equally open to participation" by black citizens. If it did not have that effect, then, logically, one would conclude no violation.

But subsection (b) of Section 2 has another phrase that must be dealt with. It, in effect, states that a showing can be made that the challenged [standard, practice or procedure] has caused the political process "not to be equally open to participation" by black citizens if it can be shown that such black citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

So, if the challenged [standard, practice or procedure] does not cause black citizens to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," then it cannot be found that such [standard, practice or procedure] causes the political processes "not to be equally open to participation" by black citizens and, therefore, finally, there would be no violation of the operative language in subsection (a), i.e., the "abridgement of the right of any citizen . . . to vote on account of race."[11]

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[11] It can be argued that "less opportunity to elect representatives of their choice" is essentially surplusage, because, if the political process is as "equally open to participation" by blacks as it is to everyone else, and if blacks do not have "less opportunity to participate in the political process" than other members of the electorate, then it would follow that blacks would have the same "opportunity to elect representatives of their choice" as everyone else. However, the "opportunity to elect" language draws the court's attention to the possible breakdown in the system that can occur when there is racially polarized block voting.

The need to prove that the challenged practice results in blacks having *both* (a) less opportunity to participate in the political process, *and* (b) less opportunity to elect representatives of their choice is discussed below under Section V.C, p. 46, and in *Chisom v. Roemer*, 111 S. Ct. 2354 (1991).

Absent a showing that the challenged [standard, practice or procedure] resulted in the *denial* of a citizen's right to vote, the first inquiry, then, will be whether that [standard, practice or procedure] caused blacks to have "less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice." *Jeffers*, 730 F. Supp. at 229-30 (Eisele, C.J., dissenting).

Since it is the 1991 redistricting decision of the Arkansas Legislature which is being challenged here, the first phrase of Section 2(a), [to wit, "No voting qualification or prerequisite to voting,"] is not implicated. Such a legislative redistricting plan, and any Section 2 challenge thereto, must therefore fall under the rubric of "standard, practice or procedure." In the context of this case, the stated purpose of Section 2 is to prohibit states and other political subdivisions from imposing any "standard, practice or procedure" which results in black citizens having less opportunity than others to participate in the political process and to elect representatives of their choice. It is the "opportunity" of blacks "to participate" and "to elect" to the same extent as other members of the electorate that may not be denied or abridged by any state created or applied barrier.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court interpreted the 1982 amendments to the Voting Rights Act. It enumerated several "objective factors" which a court should consider when analyzing the "impact" of the challenged state practice. Those factors, listed in the Senate Report to the 1982 amendment, are often called the "Senate factors" or the "Zimmer factors," since they were first mentioned in *Zimmer v. McKeithen*, 458 F.2d 1297 (5th Cir. 1973) (enumerating factors to be used in evaluating the totality of the circumstances).[12] *See generally, Gingles*, 478 U.S. at 43-45.

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[12] A lengthy discussion of these factors and their confusing and oft

However, the Supreme Court went one step further and imposed its own threshold preconditions for certain claims under Section 2:

> While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a block voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

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times misleading role in evaluating Section 2 claims will be found in the *Jeffers* dissent, 730 F. Supp. at pp. 231-232 and 252-262.

Gingles, 478 U.S. at 48-51 (citations omitted). (Emphasis in original).

The Supreme Court specifically reserved, in the context of challenges to multi-member districts, a question similar to the one at issue in the instant case. The relevant footnote to *Gingles* states: "[W]e have no occasion to consider whether sec. 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections. . . ." *Gingles,* 478 U.S. at 46 n.12. Here we are not dealing with an allegation that the use of *multimember districts* impairs the minority's ability to influence elections. But the same or similar arguments can be made in the context of forming single member districts.

To prevail plaintiffs must convince the Court that the *Gingles* preconditions to a Section 2 claim should not apply where, as here, it is impossible to meet one or more of those conditions.[13] Clearly they are contending that the black plaintiffs and intervenors should not be required to meet the condition that they show they could constitute a majority in a redesigned district. Do they claim that they need not meet the other two preconditions? Appar-

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[13] The Court is inclined to agree with the plaintiffs and the Walker intervenors that all of the *Gingles* court-created preconditions might not be required in every conceivable redistricting challenge under Section 2. First of all the statute does not mention those preconditions. (Although one of the "Senate Factors" does refer to "the extent to which voting in the elections of the State or political subdivision is racially polarized.") Those preconditions were judicially created in order to make the statute make sense in a case challenging multi-member districts. Those preconditions are now required in all run-of-the mill redistricting cases. But *Gingles* itself clearly recognized that each different challenge must be analyzed anew under the provisions of Section 2. Nevertheless the facts of this case, precedent, and especially *Jeffers,* require adherence to such pre-conditions here.

ently not, because they allege that they can establish these preconditions.

Lower federal court cases subsequent to *Gingles* hold that the preconditions engrafted onto the statute by the Supreme Court in *Gingles* apply to claims where the minority voters challenge the alleged gerrymandering of *single-member* voting districts such as those at issue here. See *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), which was also a statewide redistricting challenge. And this part of the *Jeffers* decision was affirmed by the U.S. Supreme Court, 111 S. Ct. 662 (1991).

The principal case relied upon by plaintiffs and the Walker intervenors to sustain their "influence district" contention is *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). The plaintiffs there conceded that in 1981, when the district lines were drawn, it was not possible to create a majority Hispanic district. However, at the time the suit was filed in 1988, and when relief was granted, it was possible to create such a district. That, of course, is not the situation here. Here it was impossible to create a majority black Congressional district in 1981, and it is impossible now in 1991 to create such a district.

The *Garza* Court handles the "majority population" precondition of *Gingles* as follows:

> In this appeal, the County's threshold argument is that districts drawn in 1981 are lawful, regardless of any intentional or unintentional dilution of minority voting strength, because at the time they were drawn there could be no single-member district with a majority of minority voters. The County asks us to extract from the Supreme Court's leading decision in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 27, 92 L. Ed.2d 25 (1986), and subsequent cases in this and other circuits, the principle that there can be no successful challenge to a districting system unless the minority challenging that system can show that it

> could, at the time of districting, constitute a voter majority in a single-member district.
>
> In response to this position, the appellees argue that no majority requirement should be imposed where, as here, there has been intentional dilution of minority voting strength. The County thus also challenges the sufficiency of the district court's findings with regard to intent.
>
> We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength. We affirm the district court on the basis of its holding that the County engaged in intentional discrimination at the time the challenged districts were drawn.

Garza, 918 F.2d at 769. But Section 2 does not speak in terms of intent and *Gingles* nowhere alludes to this distinction. Furthermore, the *Gingles* rationale would not support this dichotomy. Even the *Garza* majority acknowledges the need to show a discriminatory effect:

> Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result. Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, *some* showing of injury must be made to assure that the district court can impose a meaningful remedy.

Id. at 771. This is a mild but important concession since Section 2, as now written, speaks only of results and makes no distinction between the intentional and unintentional causes thereof.

The Court here also relies on two appellate decisions from other circuits. In *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the Fifth Circuit denied relief in a voting rights

challenge to an at-large election system for Killeen Independent School District in Texas. Plaintiffs' failure to show that a politically cohesive minority group could form a majority of the voters in a single-member district was dispositive of their voting-rights claim. *Id.* at 453. The *Brewer* court, relying on *Gingles,* specifically rejected the voting rights claim even though a black minority candidate might win a multi-candidate plurality election in a single-member district. *Brewer,* 876 F.2d at 454-55.

In *McNeil v. Springfield Park District,* 851 F.2d 937 (7th Cir. 1988), the Seventh Circuit directly addressed the question before this Court. There the members of the Springfield Park District Board and Springfield School Board, each consisting of seven members, were elected at large. Plaintiffs, black voters, challenged the multi-district system, asking the court to divide the districts into seven single-member districts. The U.S. District Court granted summary judgment for the defendants holding that the plaintiffs failed to satisfy the necessary "preconditions" established by the Supreme Court in *Gingles,* and, more particularly, the requirement that the plaintiffs show that black voters constituted a "sufficiently large and geographically compact [group] to constitute a majority in a single-member district."[14]

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[14] The factual situation is set out as follows:

> 2. The boundaries of the school district differ slightly from the park district. According to the 1980 census, the population of the park district was 119,334, of which 11,198 (or 9.4%) were black. The population of the school district was 122,997, of which 11,217 (or 9.1%) were black. The population of appellants' proposed single-member park district would be 50.4% black, but the voting age population would be only 43.7% black, according to 1980 census figures. Similarly, while the total population of the proposed single-member school district would be 50.2% black, the voting age population would be 43.2% black.

McNeil, 851 F.2d at 939.

On appeal the black appellants argued that they should be permitted to show that the multi-district plan impaired their ability *to influence* elections even though they could not show that the scheme impaired their ability *to elect* candidates of their choice. The *McNeil* Court addressed this argument as follows:

> Appellants finally argue that, although the application of *Gingles* may warrant summary judgment on the claim that the multi-member districts impair their ability to *elect* their preferred candidates, they can prevail on a claim that the system impairs their ability to *influence* elections. Appellants rely on a distinction made briefly by the *Gingles* majority. *See* 106 S. Ct. at 2764 n.12.
>
> * * *
>
> We cannot accept the appellants' contention that they can avoid the *Gingles* criteria by arguing that the multi-member districts impair their ability to influence elections. Given the Court's decision to draw a bright line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold *Gingles* tests to make alternative claims that would obliterate the bright line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors.
>
> Courts might be flooded by the most marginal Section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections. While Congress intended to make it easier for minorities to show that their vote has been diluted, it presumably did not intend to require courts to entertain claims by a tiny segment of a multi-member district's population that the group's inescapably minimal influence has been impaired by the electoral arrangements. In view of the Court's ap-

> parent objective of sharpening section 2's [sic] focus, we cannot consider claims that multi-member districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired.

McNeil, 851 F.2d at 947.

The Court also rejects plaintiffs' contention that *McNeil* should not apply to this case because it involved multi-member districts. On the contrary, the statements of the *McNeil* court apply even more aptly to the single-member districts in question here.

The majority opinion in *Gingles* succinctly states why a showing of "ability to constitute a majority" is a prerequisite to a Section 2 claim:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. . . .

Gingles, 478 U.S. at 50 n.17. (Emphasis in original).

In the language of *Gingles*, even "in the absence of the challenged structure or practice" (here the district lines created by Act 1220 of 1991), it cannot be shown that it is possible to create a "sufficiently large and geographically compact district" in which black voters could constitute a majority.

The claim for a "superminority" district must also fail because, *inter alia*, of the implications arising out of the third part of the 3-part test outlined in *Gingles*. In order to establish a Section 2 claim, plaintiffs must show that the white majority votes sufficiently as a block to enable it usually to defeat the minority's preferred candidate. Were plaintiffs to establish this prong of the test, they would thereby effectively demonstrate that, *because of this polarized voting*, they would *not* be able to influence the outcome of an election in their proposed district. So plaintiffs are asking the Court to fashion a "remedy" which would pack black voters into a single district where, by hypothesis, they could not elect a representative of their own choosing, while fracturing and reducing the number of blacks in adjacent districts.

But plaintiffs argue here, contrary to the position of the plaintiffs in *Jeffers*, that if the percentage of black voters in District Four is increased from 27 percent (as it is under Act 1220 of 1991) to 38 percent (as it would be under plaintiffs' proposal), it will be easier for black voters to "elect representatives of their choice" by forming coalitions with white voters.[15] Their argument not only ignores

[15] It is interesting to note that the remedy ordered in *Jeffers* actually destroyed such "influence" districts. In order to pack enough voting age blacks into certain districts to obtain supermajorities in excess of 60% it was necessary to greatly reduce the number of blacks in adjacent districts. Dramatically, old House District 85 was reduced from 38% black voting age population (VAP) to 27% black VAP whereas here the plaintiffs and black intervenors seek to take a 27% black VAP district and increase it to 38%! And House District 77 in *Jeffers* was reduced from 42% black VAP to a 20% black VAP. Other examples abound. See discussion in *Jeffers*, 730 F. Supp. at 248-49.

the need to prove under *Gingles* that polarized voting prevents this from happening, but it directly undercuts their Section 2 claim by showing that even absent a majority, they could elect candidates of their choice if they sought alliances and coalitions with other voters in the traditional political manner. If this is true there is no need for, or legal basis for, a Section 2 claim. As Justice O'Connor put it in her *Gingles* concurrence:

> . . . [I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Gingles, 478 U.S. at 89 n.1 (O'Connor, J. concurring).

The requirement of a showing of "racially polarized voting" itself acts as a limit on the percentage of black citizens that may be "packed" into a district. In the case of an area where there is racially polarized voting, the more black voters that are packed into a single legislative district, *short of a majority,* the less the black voting power or influence in the state as a whole. So if plaintiffs were able to establish the last two enumerated *Gingles* preconditions, they would thereby also establish that one cannot create an "influence" district by packing less than a majority voting age population into that district.

What if the legislature had enacted plaintiffs' proposed redistricting plan and black citizens in the old First District sued alleging a violation of Section 2? The benchmark would be the 1982 *Doulin* redistricting plan. In that plan, the black voting populations in the three implicated districts were:

Black VAP (Doulin Plan)

First	15.6%
Second	14.5%
Fourth	24.6%

Then by hypothesis the legislature enacts plaintiffs' proposed plan and the black voting population in the four districts changes to:

Plaintiffs' 1991 Proposal

First	6.2%
Second	13.5%
Fourth	38%

So whereas Act 1220 of 1991 would change the proportion of black voters to white voters only marginally in the four Congressional districts, plaintiffs' plan would dramatically dilute black voting power particularly in the First District. Therefore, if the legislature had enacted plaintiffs' proposed plan and black voters objected thereto, would not those objecting have a "lay down hand" under Section 2?

Strangely, the answer under Section 2 is probably not.[16] And this is so not only because of plaintiffs' inability to satisfy the "majority" requirement of the first *Gingles* precondition. It would also follow if the *Jeffers* majority is correct in holding that "less opportunity to elect representatives of their choice" means "less opportunity to elect *black* representatives of their choice," because that holding

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[16] But probably yes under the Fourteenth and Fifteenth Amendment if a discriminatory intent could be established. This is because the constitutional claims are not burdened by the language of Section 2.

independently implies the need for a majority black voting age population.[17]

The language of Section 2, the rationale of *Gingles* and *Jeffers*, and precedent control the disposition of defendants'

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[17] But see *Armour v. Ohio*, No. C88-1104Y, 1991 WL 204344 (N.D. Ohio, September 4, 1991), a three judge district court case decided September 4, 1991, in which black plaintiffs were also seeking an "influence" district since they could not constitute a majority in a single district. The majority held for the plaintiffs and in so doing reached the opposite position from *Jeffers* on this important issue. Note the following language from *Armour:*

> The next question that we address is whether black voters could elect a candidate of their choice in a redrawn district.
>
> For the reasons set forth below, we find that plaintiffs have shown that in the proposed district they will be able to elect a candidate of their choosing.
>
> Defendants go to great lengths to demonstrate that based upon racial voting patterns plaintiffs will not be able to elect a black candidate without a majority of black voters in the redrawn district. However, defendants misapprehend the requirements of the Voting Rights Act. The issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a *candidate of their choice.* We believe that they can. In a reconfigured district, plaintiffs will constitute nearly one-third of the voting age population and about half of the usual Democratic vote. Therefore, the Democratic Party and its candidates will be forced to be sensitive to the minority population by virtue of that population's size. Moreover, in a district composed only of Youngstown and Campbell, candidates and representatives will not find themselves in conflict between the interests of wealthy suburbs and the impoverished urban communities they serve, since black voters consistently vote eighty to ninety percent Democratic and white voters vote consistently almost fifty percent Democratic, we find that plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district.[20]
>
> [20]The State of Ohio argues that the plaintiffs' claim of an ability to elect based on an alleged correlation between the outcome of the democratic primary election and victory in the general election is flawed. We agree. Plaintiffs contend that in a redrawn district they will be able to elect a black

combined Motion to Dismiss/Motion for Summary Judgment with respect to the cause of action plaintiffs attempt to assert under the Voting Rights Act.

B. Is section 2 an Affirmative Action Statute?

But there is another more fundamental issue confronting the Court in this case and in *Armour*. In *Armour*, as here, the redistricting act under attack did not change in any significant way the population alignments that existed immediately prior to its implementation. So the fundamental issue arises: Is Section 2 an affirmative action statute at the liability stage?

> candidate in the Democratic primary by a plurality and, because the democratic candidate always wins the general election, they will therefore be able to elect a black candidate to office. The problem with this reasoning is that plaintiffs have demonstrated persuasively that white voters in Mahoning County do not usually vote for black candidates. Thus, there is no assurance that a black candidate winning the primary could muster sufficient white votes to be elected to office. However, our conclusion that blacks in a redrawn district could elect a candidate of their choice depends neither upon an historical correlation between the outcome of the primary and the general election nor upon speculation as to how a *black* can be elected, and therefore the inconsistency in plaintiffs' theory does not affect our conclusion.

Armour, 1991 WL 204344 at *14 (footnote omitted). (Emphasis in original.)

This court must follow *Jeffers* on this issue, but it is interesting to note what we have here. In *Jeffers* the majority uses the "opportunity to elect *black* representatives" test in order to establish a predicate for granting relief, and in *Armour* the Court adopts the opposite interpretation as a predicate for giving relief.

We do not understand the plaintiffs to contend that the white representatives actually elected to Congress in the First and Fourth Congressional Districts over the past decade have been the choice of the overwhelming majority of the black voters in those districts. Plaintiffs, following *Jeffers*, contend that they should be able to elect "black representatives of their choice.["]

How do the black plaintiffs and the black Walker intervenors contend that Act 1220 results in black voters having less opportunity to participate or to elect? "Less" assumes some benchmark. Less than what?

The plaintiffs Complaint states that "the *1980* redistricting plan and the proposed [Act 1220] plan fractured black population between the First, Second and Fourth Congressional Districts." Complaint, paragraph 24. They allege that Act 1220 was designed "to dilute black voting strength in the First, Second and Fourth Congressional Districts" and that it "fractured the black population . . . into three different congressional districts," Paragraph 28. More specifically plaintiffs allege:

> According to the 1990 census, the three most populous counties in terms of black population are Pulaski with 92,200 black residents; Jefferson with 36,877 black residents; and Crittenden with 21,401 black residents. The Defendants have placed these three counties in three different congressional districts under the Dowd/Harriman plan. Pulaski is in the Second District, Jefferson is in the Fourth District, and Crittenden is in the First District.

Plaintiffs' Complaint paragraph 32(a), p.10. The Complaint of the Walker intervenors likewise alleges that Act 1220 "fragmented the African American population . . . into three different congressional districts." Complaint in Intervention, paragraph 29. It further alleges that the boundaries created by Act 1220 "have the affect of diluting African American voting strength." Paragraph 46.

But the uncontested facts show that Act 1220 did not "fracture the black population into three different congressional districts." Rather it left those populations essentially undisturbed. Indeed, in their Brief, plaintiffs lament that the motivation of Act 1220 was "the preservation of the status quo." Plaintiffs' Brief, p. 17.

In their oral presentation during the first in-court conference in this case, plaintiffs suggested that the problem of fracturing the black vote goes back to the 1960's and maybe earlier. This is a recognition that in recent decades there have been no major changes in the black populations occasioned by the congressional redistricting process. Critical here, there was no significant change in 1991 from the plan adopted and approved by the Court in 1982.

So unless the legislature was obligated on the occasion of each redistricting to seek out ways and means to increase or enhance the influence of black voters, plaintiffs and the Walker intervenors must lose.

Some will say that the United States Supreme Court's actions in disposing of the *Jeffers* appeal constitute an approval *sub silentio* of the view that Section 2 is, indeed, an affirmative action statute requiring the states during any redistricting process to maximize the political effectiveness of black voters. But this can only be "judicial legislation," for Section 2 only prohibits the imposition or application of any standard, practice or procedure in a manner that results in black voters having less opportunity than others to participate in the political process or to elect representatives of their choice. "Less opportunity" by any fair interpretation means "less opportunity" than such black voters had immediately before the imposition or application of the challenged standard[,] practice or procedure;[18] not "less opportunity" than they would have, had

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[18] Let us assume that during the 1960 redistricting black voters were fragmented or packed in a manner that resulted in their having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Then assume that the redistricting process in 1970, 1980 and 1990 simply continued the 1960 lines (to the extent possible under the one-person, one-vote principle). Can it be said under such circumstances that the 1990 lines result in black voters having less opportunity just as much as the 1960 lines? It defies logic to contend that it is the 1990 lines

the legislature seized the opportunity to help them by maximizing their political influence.

It is the Court's opinion that Section 2, in the context of this case, is not an affirmative action statute. It seeks equal opportunity—not unequal opportunity. And even though affirmative action type *remedies* may be available (within constitutional limits) upon proof of a violation of the statute, that statute is not violated by a state legislature simply because that legislature does not enact a districting plan that maximizes black political power or influence. The legislature's plan, to trigger Section 2 relief, must first harm or dilute black political opportunity. If it does not, there is no violation and no predicate for potential draconian enhancement remedies such as we find in *Jeffers*.[19] So on this basis alone, plaintiffs and the Walker intervenors must lose on their Section 2 claim.

Justice Scalia in his dissent in *Chisom* recites established principles of statutory construction that so often are overlooked or ignored in dealing with the Voting Rights Act:

> Section 2 of the Voting Rights Act is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute. I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and es-

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that have caused the problem because the problem, by hypothesis, would be the same whether redistricting occurred in 1990 or not. It can not therefore be said that, but for the 1990 redistricting, black voters would have had the equal opportunity required by the law.

[19] This Court believes that such remedies are also limited by the Constitution but we need not explore those limits here.

> pecially if a good reason for the ordinary meaning appears plain--we apply that ordinary meaning.

Chisom, 111 S. Ct. at 2369 (Scalia, J., dissenting).

He laments the approach that "begins not with what the statute says but with an expectation about what the statute must mean."

> As method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it. Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, see *Holmes, The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899), and apply the meaning so determined.

Id.

It is the failure to follow such wise counsel that has resulted in most of the confusion we find in the Section 2 cases.

C. Another Barrier: The Dual Proof Requirement of Section 2

There is another threshold barrier to plaintiffs' claim here. This can best be identified by reference to a discussion in the *Jeffers* case. It will be recalled that the *Jeffers* Court was not unanimous in answering the following question:

> To make out a Section 2 violation, must plaintiffs prove both of the following: that, as a result of the 1981 district lines, blacks (1) have less opportunity to participate in the political processes; and (2) have less opportunity to elect representatives of their choice?

The majority was of the opinion it was not necessary to prove both. That opinion stated:

> Even if plaintiffs failed to show less opportunity to participate in the political process, a showing that they have less opportunity to elect candidates of their choice would suffice to establish their claim. The right protected is the aggregate of these opportunities—the right to effective participation in the political system . . .

Jeffers, 730 F. Supp. at 204. The dissent disagreed. *Id.* at 231.

This argument has now apparently been resolved consistent with the minority's view in *Jeffers*.[20] In *Chisom v. Roemer*, 111 S. Ct. 2354 (1991), the Supreme Court discusses and resolves the issue as follows:

> The *LULAC* majority assumed § 2 provides two distinct types of protection for minority voters—it protects their opportunity "to participate in the political process" and their opportunity "to elect representatives of their choice."
>
> * * * *
>
> Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The

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[20] A summary affirmance of a Three-Judge District Court by the U.S. Supreme Court is clearly of more precedential significance than a denial of certiorari. But the question is: how much more? The Supreme Court in *Chisom* reverses a critical holding in *Jeffers* without even citing that opinion. And *Jeffers* was affirmed less than a year before *Chisom* was decided.

> statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgement of *"the right"* to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.
>
> The statutory language is patterned after the language used by Justice White in his opinions for the Court in *White v. Regester,* 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973) and *Whitcomb v. Chavis,* 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). See n.22, *supra.* In both opinions, the Court identified the opportunity to participate and the opportunity to elect as inextricably linked. In *White v. Regester,* the Court described the connection as follows: "The plaintiffs' burden is to produce evidence . . . that its members had less opportunity than did other . . . residents to participate in the political processes *and* to elect legislators of their choice." 403 U.S. at 149, 91 S. Ct. at 1872 (emphasis added).

The results test mandated by the 1982 amendment is applicable to all claims arising under § 2.

Chisom, 111 S. Ct. at 2364-65.

The point is important to make because the majority in *Jeffers* appears to have conceded that plaintiffs there could not show that the state-legislature redistricting plan at issue resulted in blacks having less opportunity to partic-

ipate in the political process than others in the electorate. Note the language of the majority's opinion in *Jeffers:*

> . . . We further find that voting in the areas of the State in question is markedly polarized by race. Both black and white voters usually prefer candidates of their own race. Black voters are far from powerless. They exercise significant, sometimes decisive influence. But they can elect a candidate of their choice, in a district in which the voting-age population is majority white, only if that candidate is white. For the foreseeable future, the present location of legislative district lines will make it very difficult to elect more than six black legislators, out of a total in both houses of 135 members. And this is so even though black people make up about 16 percent of the total population of the State of Arkansas.
>
> In this situation, *black citizens have less opportunity* than other members of the electorate *to elect representatives of their choice.* This is a violation of Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b). For reasons we shall explain in this opinion, Plaintiffs have proved a violation of the law in all of the areas of the State called in question by this suit, except for Pulaski County. (Emphasis supplied).

730 F. Supp. at 198.

It is assumed that if no such showing (i.e. that the district lines resulted in blacks having less opportunity to participate in the political process) could be made in that case, then, *a fortiori,* it could not be made here. Therefore, if proof of both such elements is required as a matter of law, then under that assumption plaintiffs would fail here in any event.

The Court notes the following language of the plaintiffs' Complaint:

> The Voting Rights Act has been violated by the Defendants for the reason that the congressional district boundaries have been drawn to dilute black voting strength and has the effect or result of giving the black citizens of this State less opportunity than other members of the electorate to elect representatives of their choice.

Complaint at 10. So we see that plaintiffs here do not even contend that the congressional district lines as fixed by Act 1220 of 1991 result in their having less opportunity to participate in the political process than other members of the electorate; they claim only that such district lines "result" in black citizens having "less opportunity . . . to elect representatives of their choice." Under *Chisom,* the plaintiffs' Complaint would not be adequate because it fails to allege *both* of the elements required by Section 2. The Complaint of the black intervenors (the "Walker" intervenors) however, while stating the Section 2 claim in several different ways, nevertheless does allege both prongs. See paragraph 30.

But it is not clear that the Walker intervenors contend that their having less opportunity to participate in the political processes *results* from the redistricting plan. Nor do we find an allegation that black citizens *voting in U.S. Congressional elections* have not been able to elect white candidates of their choice. All we find in that regard is the following allegation in paragraph 50:

> In the modern history of the area covered by the First, Second and Fourth Congressional Districts, there has never been an African American elected to the United States House of Representatives. Since 1960, three African Americans have run unsuccessfully for Congress from the area covered by the First, Second and Fourth Congressional districts.

Therefore if a Section 2 cause of action requires *both* the allegation and proof that the new district lines result in

black citizens having less opportunity to participate and also the allegation and proof of less opportunity to elect representatives of their choice, then the Walker intervenors also fall short.

Furthermore the plaintiffs and the Walker intervenors appear to rely solely on the inferences from the history of discrimination in housing, health and education as the proof for their allegation that black citizens have less opportunity to participate in the political process. This issue therefore requires no proof and may be resolved as a question of law.

Even under the majority opinion in *Jeffers*, the only basis for the intervenors to contend that black voters do not have equal opportunity to participate in the political process would be found in one of the Senate factors, i.e., the present effects of past racial discrimination in areas of health, education and employment. See *Jeffers*, 730 F. Supp. at 204. And the Senate or *Zimmer* factors cannot suffice for the proof required by Section 2. As stated in the minority-dissenting opinion in *Jeffers:*

> First, Section 2(b) requires a *cause and effect* showing that the *challenged* [standard, practice or procedure (SPP)] is responsible for blacks having "less opportunity than other members of the electorate to participate in the political process." The finding in *Smith*, means that neither present legal barriers nor the redistricting plan formulated by the Board of Apportionment in 1981 is responsible for blacks having "less opportunity than other members of the electorate to participate in the political process." Rather, it is the present effects of past discrimination in health, education and employment. Stated otherwise, the opportunity of blacks to participate in the political process would be the same regardless of the manner in which the Board drew the district lines.

* * * *

The majority would probably reply, as certain other federal courts have, that we must look at the "interaction" of the SPP with impairments blacks suffer as a result of prior discrimination to determine if that SPP results in blacks having less opportunity to participate in the political process. This is linguistic legerdemain. Clearly it is not the line drawing by the board—the SPP here—which "results" in blacks having less such opportunity; rather, it is the diminished socio-economic status found to have resulted from prior discrimination.[1]

[1]And rarely do courts try to quantify or identify the causes of the "diminished socio-economic status" of blacks. They appear to be satisfied if they can comfortably say it is in some degree the result of prior official discrimination. If no more is needed, this is an easy "given." But reality may make it apparent that prior discrimination played a small role. One has only to examine the reasons for the poverty and unemployment in the Delta counties of Arkansas to understand this. Blacks and whites were much better off (as compared to the rest of the state) in that area in 1970 than they are now. The district court in *Whitfield* referred to "the dire economic circumstances that have developed in that area of the state over the past decade." *Id.* at 1384.

And Section 2 does not purport to give a remedy solely on the latter basis. At the risk of argumentative overkill, assume the Board had drawn the district lines exactly as plaintiffs now request. Would the opportunity of blacks "to participate" be different? Clearly not. This error in analysis I identify as the source of so much unnecessary intellectual conflict in the "voting rights" cases and as the principal source of the misuse of certain of the *Zimmer* or Senate factors.

Is not all of this obvious? The socio-economic condition of blacks in any given area—wherever it is—will al-

> ways be a "given" in any voting rights challenge. And, unfortunately in this country, from sea to sea, blacks, although making significant progress, still suffer adverse effects in education, the economic arena and health, and, on a statistical basis, are simply not as well off as non-blacks in our society. So, if one accepts that being poor, uneducated, unhealthy, etc., decreases one's "opportunity to participate" in the political process, then there will be no voting SPP which will be immune from attack. Elections per se could be as readily attacked!

Jeffers, 730 F. Supp. at 237-38 (Eisele, C.J., dissenting).

The majority's predicate finding for its holding that the defendants in *Jeffers* violated Section 2 is that black citizens "have less opportunity than other members of the electorate to elect representatives of their choice." There is no *finding* that black voters have "less opportunity than other members of the electorate to participate in the political process." And when it comes to a discussion of the Section 2 claim, the majority in *Jeffers* states:

> At the outset, defendants make two legal arguments that would bar the action altogether if successful. First, they say that under the plain language of Section 2(b) plaintiffs must show two separate things: (1) that they have less opportunity to participate in the political process; and (2) that they have less opportunity to elect representatives of their choice. Even if they have shown the second, the argument runs, they cannot win this case, because they cannot make the first showing. There are no presently existing legal barriers to voting by black citizens in Arkansas, and therefore they have just as much opportunity to participate in the political process as anyone else.

730 F. Supp. at 204. So, even though the majority in *Jeffers* went on to say that the defendants' argument did

not reckon with the present effects of past discrimination, it acknowledged that in Arkansas black voters had as much opportunity in the 1981-1990 period to participate in the political process as anyone else. It is for that reason that it recognized that if plaintiffs had to prove as an essential element of their Section 2 claim that because of the district lines they had less opportunity to participate in the political process than others, then their action under Section 2 would fail.

Congress did not intend to provide minority voters with the "maximum feasible minority voting strength." *Gingles*, 478 U.S. at 94 (O'Connor[,] J., concurring). The maximum minority voting strength would be tantamount to proportional representation, which is expressly prohibited by the language of the statute. Plaintiffs' argument to the contrary is inconsistent with the *"results"* test enacted in the statute and the clear disclaimer of any right to proportional representation. *Id.* Indeed, the Supreme Court has rejected any claim to proportional representation or "maximum feasible representation" throughout the history of the Voting Rights Act. *See, e.g., White v. Regester*, 412 U.S. at 765-66 (1973); *Whitcombe v. Chavis*, 403 U.S. 124, 148-56 (1971).

In *McNeil v. Springfield*, 851 F.2d 937 (7th Cir. 1988) the district court's grant of summary judgment in favor of the defendants was attacked on appeal on the ground that summary judgment was inappropriate in Section 2 voting rights cases because the statute requires courts to take a "functional" view of the challenged process and evaluate the "totality of the circumstances." But the Court held that this argument "fails in light of *Thornburg v. Gingles*":

> To pass the summary judgment threshold, a minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. [*Gingles*, 106

> S. Ct. at 2766.] The group must also show that it is politically cohesive and that white bloc voting usually thwarts election of the minority's preferred candidate. Only upon satisfaction of these threshold criteria should a court conduct its totality-of-the-circumstances analysis and consider other relevant factors set forth in *White*. As the Court explained, ["]Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.["] *Id.* at 2766-67 n.17 (emphasis in original). Thus, although a section 2 claim potentially implicates many factors the Court stated in no uncertain terms that a challenge to a multi-member district cannot be sustained unless the *Gingles* preconditions are met. We must therefore reject appellants' contention that summary judgment is improper in section 2 cases.
>
> * * * *
>
> We therefore must reject appellants' contention that a court, in considering section 2 claims, must explore the totality of the circumstances without first determining whether the *Gingles* threshold criteria are met.

McNeil, 851 F.2d at 942-943.

The Court concludes that there are no genuine issues of fact and that defendants are entitled to summary judgment on the Voting Rights Act claim as a matter of law.

VI. INTENTIONAL RACIAL DISCRIMINATION

The Constitutional Claims

Plaintiffs claim that the defendants intentionally discriminated against a protected class, the black minority voters of the State of Arkansas, when they enacted Act 1220 into law. The basis of plaintiffs' claim is that

"defendants took no affirmative action to ensure that a congressional district was created with a maximum percentage of black residents" and that the "effects of the proposed plan on racial minorities" was not considered in its enactment. See Complaint, p. 8.

The Court concludes that plaintiffs' claim that the defendants violated the Fourteenth and Fifteenth Amendments to the Constitution must fail as a matter of law. Plaintiffs and the Walker intervenors fail to make out a claim upon which relief may be granted based on their allegations that the legislature enacted Act 1220 with the *intention* to discriminate against them as a protected class.

The legal standard for such claims was discussed by the majority in *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark 1990):

> Before discussing the proof, we must decide what legal standard applies to the question whether constitutional violations have occurred. All parties agree that intentional racial discrimination is an essential element of plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment. They disagree, however, with respect to the Fifteenth Amendment. Plaintiffs take the position that a discriminatory impact on black voters is sufficient to establish a Fifteenth Amendment claim. This is essentially the same legal standard as the "results test" enacted as a matter of statute by the 1982 amendments to the [] Voting Rights Act. Defendants, on the other hand, argue that intentional racial discrimination must be shown.
>
> We think defendants have the better of the argument on this point. We look first to the text of Section 1 of the Fifteenth Amendment. It reads:
>
> > The right of citizens of the United States to vote shall not be denied or abridged by the

> United States or by any State on account of race, color, or previous condition of servitude.

For purposes of comparison, we also set out here the text of the Equal Protection Clause of the Fourteenth Amendment:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

* * * *

> We hold that the same proof of conscious racial discrimination required to show a violation of the Equal Protection clause of the Fourteenth Amendment is also required in Fifteenth Amendment cases. *Accord, Nevett v. Sides,* 571 F.2d 209, 220-21 (5th Cir. 1978). This does not mean that racial discrimination must be the sole motive behind the action challenged. It need only be one of the motivating factors but for which the action would not have been taken.

Jeffers, 740 F. Supp. at 587-89.

So intentional racial discrimination is an essential element that must be shown in order to state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment. *Jeffers,* 740 F. Supp. at 587-89 (citing, *City of Mobile v. Bolden,* 446 U.S. 55 (1980) and *Nevett v. Sides,* 571 F.2d 209, 220-221 (5th Cir. 1978)). The issue is whether the legislative district boundaries were purposefully drawn to discriminate on the basis of race. *See, City of Mobile,* 446 U.S. at 67 (citing, *Washington v. Davis,* 426 U.S. 229, 240 (1976); *Wright v. Rockefeller,* 376 U.S. 52 (1964)). However, not only must plaintiffs prove intentional discrimination but they must also prove that such intentional racial discrimination has an actual discriminatory effect. As stated by Justice White in *Davis v. Bandemer,* 478 U.S. at 127:

> We agree . . . that in order to succeed the . . . plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.

The Court concludes that plaintiffs fail to state a claim upon which relief can be granted because they *cannot* prove, as a matter of law, that regardless of the legislative intent, Act 1220 actually has the effect of discriminating against black voters or dilutes or diminishes their influence.

And the Court further concludes that the Fourteenth and Fifteenth Amendments to the Constitution create no obligation on the states during the redistricting process to, as alleged here, take "affirmative action to ensure that a congressional district was created with a maximum percentage of black residents." Complaint at 8.

The Court also concludes that the congressional districts in effect prior to the enactment of Act 1220 were not tainted by unconstitutional racial animus. The congressional districts in force since 1982 are those districts which were formed by *this Court* in *Doulin*. The Court acted to implement its own remedy after finding that the legislative plan of 1981 violated the one person, one vote principle. The *Doulin* Court gave the Governor sufficient time to call a special session of the legislature in order to reconsider the law. The Governor decided not to call the legislature into special session. Therefore the Court, faced with a number of statutory filing deadlines for the 1982 congressional election, implemented its own plan. That plan is presumptively constitutional and has never been challenged. The Court-imposed plan therefore insulates the state from any allegation that the 1982 congressional districts were enacted with an *intentional* racial prejudice. Furthermore, the 1982 district lines are not under attack here. Laches presumably would prevent any such attack at this late date. The 1982 plan therefore becomes the

"benchmark" for determining whether the 1991 plan, under attack here, diluted black voting power by fracturing black voters into separate districts or packing them into one district.

Finally, the Court concludes that a compelling need to abide by the equal protection guarantee of "one person, one vote," is more than sufficient to supply the legislature with a legitimate nondiscriminatory purpose. The Arkansas General Assembly was aware of this Court's decision in *Doulin* and the subsequent Supreme Court case, *Karcher v. Daggett,* 462 U.S. 725 (1983), which re-stated the stringent standard for evaluating equal protection claims (described more fully below). Plaintiffs' exhibit 2. The state legislature also was aware of the need to follow the "one person, one vote" standard for evaluating equal protection claims when it considered the various proposed congressional redistricting plans earlier this year. The legislature consequently decided to follow the *Doulin* plan as closely as possible in allotting to the various legislative districts sufficient numbers of citizens so as not to violate the equal protection clause. That approach resulted in the greatest continuity and the least disruption.

The Court must evaluate the complaint of "intentional discrimination" under the standard set forth in *Davis v. Bandemer,* 478 U.S. 109 (1986) (plurality opinion), decided on the same day as *Gingles.*

Davis concerned a constitutional challenge to the 1981 Indiana state legislative apportionment based on the ground that the law unconstitutionally diluted the votes of Indiana Democrats. The Supreme Court reversed the judgment of the three-judge district court and held that the plaintiffs could not surmount the threshold requirement for showing discriminatory vote dilution.

Justice White, writing for four justices in *Davis,* stated the test as follows:

As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Again, without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately under-represented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.

Although this is a somewhat different formulation than we have previously used in describing unconstitutional vote dilution in an individual district, the focus of both of these inquiries is essentially the same. In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. . . . Statewide, . . . the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole. And, as in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Based on these views, we would reject the District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required

> to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one-person, one-vote imperative often mandates departure from this result as does the no-retrogression rule required by section 5 of the Voting Rights Act. Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step towards that end, which would be so much at odds with our history and experience.
>
> The view that a prima facie case of illegal discrimination in reapportionment requires a showing of more than a *de minimis* effect is not unprecedented. Reapportionment cases involving the one person, one vote principle such as *Gaffney v. Cummings*[, 412 U.S. 735 (1973)] and *White v. Regester* provide support for such a requirement. In the present, considerably more complex context, it is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions.

Davis, 478 U.S. at 132-34 (footnotes omitted).

Davis, as noted, did not involve allegations of racial discrimination. Rather it presented only an equal protection claim under the Fourteenth Amendment. So Section 2 of the Voting Rights Act and the Fifteenth Amendment did not come into play in that case. But *Davis* is important

here for another reason which bears directly upon the propriety of disposing of this case on summary judgment. Plaintiffs here claim that they could, if given the opportunity, show that the Arkansas General Assembly, in passing Act 1220, acted with the intent to discriminate against black voters. In *Davis*, Justice White accepted that the evidentiary record in that case would support a finding of discriminatory intent:

> Further, we are confident that if the law challenged here had discriminatory effects on Democrats, this record would support a finding that the discrimination was intentional. Thus, we decline to overturn the District Court's finding of discriminatory intent as clearly erroneous.

Davis, 478 U.S. at 127.

Nevertheless the Court dismissed the case because the plaintiffs failed to make an adequate showing of discriminatory effect:

> We do not accept, however, the District Court's legal and factual bases for concluding that the 1981 Act visited a sufficiently adverse effect on the appellees' constitutional protected rights to make out a violation of the Equal Protection Clause. The District Court held that because any apportionment scheme that purposely prevents proportional representation is unconstitutional, Democratic voters need only show that their proportionate voting influence has been adversely affected. 603 F. Supp. at 1492. Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be. *Whitcomb v. Chavis*, 403 U.S. at 153, 156, 160, 91 S. Ct. at 1874, 1876, 1878;

> *White v. Regester*, 412 U.S. at 765-766, 93 S. Ct. at 2339-2340.

Davis, 478 U.S. at 129-30.

And Justice White also observed: "This is true of a racial as well as a political group . . . It is also true of a statewide claim as well as an individual district claim." *Id.* at 130. And he points out the negative side of creating "safe districts" in order to achieve proportionate representation:

> To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this "political fairness" approach in *Gaffney v. Cummings*, despite its tendency to deny safe district minorities any realistic chance to elect their own representatives. But *Gaffney*, in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.
>
> * * * *
>
> These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render the scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections.
>
> * * * *
>
> Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does

> not constitute impermissible discrimination under the Equal Protection Clause.

Id. at 130-132. And Justice O'Connor in the concurring opinion in *Davis*, while stating her view that the plaintiffs' claim there raised a nonjusticiable political question, went on to express her concern about the efforts to establish proportional representation:

> To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues. It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of rough proportional representation for all political groups. The consequences of this shift will be as immense as they are unfortunate. I do not believe, and the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices abut how this Nation is to be governed. Nor do I believe that the proportional representation towards which the Court's expansion of equal protection doctrine will lead is consistent with our history, our traditions, or our political institutions.
>
> * * * *
>
> If members of the major political parties are protected by the Equal Protection Clause from the dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups.

* * * *

> There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

* * * *

> . . . no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment.

Id. at 145-147. On the basis of the uncontested facts, plaintiffs' claim here would not meet this *de minimus* effects test. And the relief prayed for directly implicates the concerns expressed by both Justice White and Justice O'Connor.

Plaintiffs seek an evidentiary hearing to determine if the legislature in enacting Act 1220 had a racially discriminatory intent. However, it is the opinion of the Court that a discriminatory intent would be irrelevant for the purpose of the relief being sought here because it cannot be shown that the redistricting required by Act 1220 had a discriminatory effect or diluted black voting strength or influence.

VII. MALAPPORTIONMENT

Plaintiffs and the Lonoke intervenor also challenge the apportionment of the population in the various congressional districts under Act 1220. They claim that the population deviations among the districts is unconstitutional because it violates the one person, one vote requirement.

The Court concludes that plaintiffs and the Lonoke intervenor state a claim on this ground. The Court further concludes that there are issues of material fact which preclude the granting of summary judgement.

The Supreme Court has held that "there are no *de minimis* population variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, sec. 2, without justification." *Karcher v. Daggett*, 462 U.S. 725, 734 (1983). In *Karcher*, the Supreme Court affirmed the three-judge district court which held New Jersey's 1980 congressional reapportionment scheme unconstitutional. The largest New Jersey congressional district had a population of 527,349 persons. The smallest New Jersey congressional district had a population of 524,825 persons. The difference between them, 3,674 persons, resulted in a difference of 0.6984 percent of the population of the average district population of 526,059.

The *Karcher* Court affirmed the test that the district courts should apply in determining whether or not population variances between congressional districts are constitutional. The Court sets out the test in full:

> Article I, section 2, establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "an nearly as is practicable." As we explained further in *Kirkpatrick v. Preisler:*
>
> > [T]he "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. *See Reynolds v. Simms*, 377 U.S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small. 394 U.S. at 530-531.

> Article I, section 2, therefore, "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.["] 394 U.S. at 531. *Accord, White v. Weiser,* 412 U.S. 783, 790 (1973).
>
> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal. *Kirkpatrick,* 394 U.S. at 532 *Cf. Swann v. Adams,* 385 U.S. 440, 443-444 (1967).

Karcher, 462 U.S. at 730-31.

The Court concludes that, under the *Kirkpatrick* and *Karcher* tests, defendants are not entitled to summary judgment on this issue. There is a difference of 4,321 persons between the largest and smallest districts in Act 1220, or a difference of 0.7353 percent from the population of an average district of 587,681 residents. Plaintiffs and Lonoke intervenor bear the burden to show that the difference among the congressional districts could have been avoided. Assuming, for the purposes of the instant motion, that plaintiffs have met that burden by presenting to the Court a plan with a variance of something less than 0.15 percent, defendants bear the burden of proving that each significant variance between districts was necessary to

achieve some legitimate goal. There has not been a sufficient showing of such by the defendants on the record before the Court.

VIII. CONCLUSION

Defendants' Motion for Summary Judgment with respect to the Malapportionment claim must be denied; genuine factual issues remain.

Defendants' Motion for Summary Judgment with respect to plaintiffs' and Walker intervenors' claims under Section 2 of the Voting Rights Act and under the Fourteenth and Fifteenth Amendments must be granted because there are no genuine issues of fact affecting the disposition of said motions, and defendants are entitled to judgment as a matter of law on said claims because:

A. With respect to *both* the Section 2 and the Constitutional Claims, Act 1220 of 1991 does not have an actionable discriminatory effect; its implementation would not result in dilution of claimants' political power or in claimants' having less opportunity to participate in the political process and to elect representatives of their choice.

B. With respect to the Section 2 claim:

1. Claimants cannot meet the *Gingles* preconditions:

   a. Claimants cannot show that black voters can constitute a majority in a single district.

   b. Claimants must show racial polarization and block voting. If they cannot so show, their Section 2 claim fails. If they can so show, that same showing would establish that packing black voters into a single district short of a majority would not increase black political "influence" but would overall decrease it.

   c. Claimants cannot, as they must, establish *both* that Act 1220 resulted in black voters having

> less opportunity to participate in the political process than others *and* that it resulted in black voters having less opportunity to elect representatives of their choice.

The Court will therefore grant defendants' Motion for Summary Judgment as to the Voting Rights Act claim and as to the Fourteenth and Fifteenth Amendment claims.

IT IS THEREFORE ORDERED that defendants' Motion for Summary Judgment, be, and it is hereby, GRANTED IN PART AND DENIED IN PART. The Court grants the Motion for Summary Judgment as to plaintiffs' and intervenors' Voting Rights Act claim and as to plaintiffs' and intervenors' claim that Act 1220 violates the Fourteenth and Fifteenth Amendments, in accordance with the terms of this Order. The Court denies the Motion for Summary Judgment as to the malapportionment claim.[21]

Dated this 15th day of November , 1991.

FOR THE COURT

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

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[21] The denial of defendants Motion for Summary Judgment on the malapportionment claim was earlier communicated to counsel. An evidentiary hearing was thereupon scheduled on such issue for September 3, 1991. At the conclusion of the hearing the Court informed the parties that it was denying and dismissing plaintiffs' claim. A supplementary opinion, of even date herewith sets forth in greater detail the basis of the Court's decision.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CIVIL No. LR-C-91-295

JESSIE TURNER; CHRISTINE BROWNLEE; JACK FOSTER; ALAN SMITH; AND FREDDIE LYON
PLAINTIFFS

V.

THE STATE OF ARKANSAS; BILL CLINTON, Governor of the State of Arkansas; WILLIAM J. McCUEN, Secretary of State of the State of Arkansas; JOHN M. LIPTON, Speaker of the Arkansas House of Representatives; and JERRY P. BOOKOUT, President Pro Tempore of the Arkansas Senate
DEFENDANTS

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

NOV 15 1991

CARL R. BRENTS, CLERK

By:_____
DEP. CLERK

OPINION
MAL-APPORTIONMENT CLAIM

In 1982 a Three Judge District Court composed of Circuit Judge Richard Arnold and District Judges Overton

and Woods held that Act 1965 of 1981 of the Arkansas General Assembly was unconstitutional under Article I, Section 2. The Court then announced its intention to order into effect a new plan unless the Governor called the General Assembly into extraordinary session to enact a new, valid plan of its own. The Governor, with the concurrence of some legislators decided not to call a special session and it therefore became the duty of the Court to order into effect its own congressional redistricting plan.

The parties in the *Doulin* case then submitted to the Court eight different plans, identified as the Ray Plan, the original Miller Bill and plans A through F. Apparently plans A through F were all presented at or after the trial by the plaintiffs. The variances from the ideal ranged from 1.17% for the Ray Plan down to 0.13% for Plan A. The "original Miller Bill" had a tolerance of 0.78%. The plans submitted by the plaintiffs ranged from 0.13% (Plan A) to 0.44% (Plan F). By way of comparison Act 1965, which the Court declared invalid, produced a 2.10% variance. The plaintiffs in *Doulin*, urge the Court to adopt either Plan A (0.13% variance) or Plan B (0.17%). The defendants urged the adoption of the original unamended Miller Bill (0.78% variance). Because Judge Arnold's opinion explains in detail the Court's decision to adopt the "original Miller Bill" Plan (0.78% variance) we quote it at length as follows:

> "(1) Obviously equality of population among districts is the principal criterion at this remedial stage of the case, as it was at the liability stage. See, e.g. *Shayer v. Kirkpatrick, supra*, slip op. at pp. 9-14; *In re Illinois Congressional Districts Reapportionment Cases*, No. 81-C-3915 (N.D.Ill. 1981), aff'd mem. sub nom. *Ryan v. Otto*, ___ U.S. ___, 102 S.Ct. 985, 71 L. Ed.2d 284 (1982). If it were the only criterion, our task would be easy. We should simply adopt Plan A, which has the lowest population variance of any plan sub-

mitted, and be done with it. But *White v. Weiser*, 412 U.S. 738, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973), holds that population is not the sole criterion when the time comes for a court to devise a plan to replace an unconstitutional districting arrangement. There, the Texas Legislature had passed a law with a total percentage deviation of 4.13%. A district court held this law unconstitutional, and the Supreme Court agreed, 412 U.S. at 790-93, 93 S.Ct. at 2352-53. The lower court then ordered into effect Plan C, which had a variance of .284%, and rejected Plan B, whose variance was .149%.

"As to the remedy, the Supreme Court reversed, holding that Plan B should have been adopted. The Court mentioned that Plan B had a lesser population variance, but its analysis did not stop there, as it would have if population had been the sole and exclusive consideration. The Court criticized the lower court's selection of Plan C as "ignor[ing] legislative districting policy and construct[ing] districts solely on the basis of population considerations." 412 U.S. at 796, 93 S. Ct. at 2355. Plan B, it held, should have been adopted, not only because it produced districts more nearly equal in population, but also because it "most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements." *Ibid.* The Court's reasoning was summarized as follows:

> "Here, it is clear that Plan B, to a greater extent than did Plan C, adhered to the desires of the state legislature while attempting to achieve population equality among districts. S.B. 1, a duly enacted statute of the State of Texas, established the State's 24 congressional districts with locations and

> configurations found appropriate by the duly elected members of the two houses of the Texas Legislature. As we have often noted, reapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task. Here those decisions were made by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts.

Id. at 795-96, 93 S. Ct. at 2354, 2355 (citation omitted).

"(2) This language fits the case before us. Act 965 of 1981, "a duly enacted statute of the State of [Arkansas], established the State's [four] congressional districts with locations and configurations found appropriate by the duly elected members of the two houses of the [Arkansas] Legislature." The "decisions" thus "made by the legislature in pursuit of what were deemed important state interests . . . should not be unnecessarily put aside," notwithstanding the fact that Act 965 itself has not withstood constitutional attack. Here, everyone agrees that the original Miller Bill is significantly closer to [A]ct 965 than any of the newly suggested plaintiffs' plans. In fact, Act 965 *is* the Miller Bill, as amended in the House. Adoption of the original Miller Bill would result in the moving of only three counties from their locations as specified in Act 965, while Plan A would require the moving of 17 counties and many more people. The Miller Bill, in its

unamended version, would have moved only eight counties from their previous (1971-81) location, while Plan A would move 15. We are not obliged to ignore the fact that the Miller Bill would disrupt existing patterns of constituency-representative relationships far less than Plan A. See *White v. Weiser, supra,* 412 U.S. at 791, 93 S.Ct. at 2352. The original Miller Bill is preferable to Plan B for most of the same reasons (although Plan B would move only eight counties from their location under the previously effective reapportionment of 1971), as well as for the reasons given in our first opinion in this case, in which Plan B was briefly discussed. By adopting the original Miller Bill, we accomplish two important objectives at the same time: population variance is reduced from 2.10% in Act 965 to only 0.78%; and the desires of the people's elected representatives, as expressed by law, are adhered to except for the location of three counties.

"Plaintiffs resist this reasoning on two principal grounds. First, they insist that adoption of the Miller Bill cannot be justified as a permissible deference to State policy, because the General Assembly, in passing Act 965, necessarily rejected the Miller Bill as originally introduced. They regard as irrelevant the fact that the original Miller Bill passed the Senate, relying on cases such as *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187, 197, 92 S.Ct. 1477, 1484, 32 L.Ed.2d 1 (1972) (per curiam), which holds that even a reapportionment plan passed by both houses, but which failed to become law, does not amount to State policy to which courts should defer in the present context. This argument misses the mark. It is not the original Miller Bill that represents the State policy which we believe

should be taken into account, but Act 965 itself, which passed both houses *and* became law. That the original Miller Bill comes closer to Act 965 than either Plan A or Plan B is therefore a point clearly in its favor under the *White v. Weiser* analytical framework.

"Second, plaintiffs correctly point out that under *White v. Weiser* State policy can be a factor only in choosing between two proposed remedies both of which are "fully adequate to redress constitutional violations," 412 U.S. at 797, 93 S.Ct. at 2355. If the original Miller Bill would produce a unconstitutional variance in population, obviously we could not adopt it, however much it would accord with the policy of the State. At the trial of this cause, speaking in the context of those plans actually considered by the Legislature in 1981, counsel for plaintiffs virtually conceded that they would have had no constitutional claim had the Legislature passed the Miller Bill without amendment at that time. Now, however, it is suggested that the Miller Bill would not be constitutional, because other plans (A through F) are available that would produce a smaller population variance. This proposition is only another way of saying that we must of necessity always select that plan put forward by the parties that more nearly approaches precise mathematical equality—a conclusion forbidden, in our view, by *White v. Weiser*, or, at any rate by its necessary logical implications. The situation would be quite different if the Arkansas Legislature had utterly failed in its duty to pass a new reapportionment law after the 1980 census. The case would then be akin to *Shayer v. Kirkpatrick, supra* (Missouri); *In re Illinois Congressional Districts Reapportionment Cases, supra;* and *Dunnell v. Austin,*

> 344 F.Supp. 210 (E.D. Mich. 1972), in each of which the State legislatures involved had passed reapportionment law since the last census. Here, the Arkansas General Assembly did make a genuine effort, untainted by any suspect or invidious motives. The division of the State made by Act 965 is therefore entitled to some weight in the process of fashioning a remedy. Whether this State policy is weighty enough to justify the 0.65% difference in variance between Plan A and the original Miller Bill is, we suppose, a question of judgment, as to which reasonable people may differ. It is our judgment that the original Miller Bill is close enough to the State policy embodied in Act 965, and Plan A different enough from that policy, to make the adoption of the original Miller Bill the more judicious remedy in this case."

Doulin v. White, 535 F.Supp. 450 (1982).

The deference paid by the *Doulin* Court to legislative choices is noteworthy.

The defendants here put on the testimony of Mr. Pat Flannigan [sic] who has been a member of the House of Representatives of the Arkansas General Assembly since 1976. He comes from Forrest City and serves St. Francis, Monroe and parts of Lee Counties. He was the chairman for the subcommittee in charge of congressional redistricting for the 1991 legislative session. He explained the adoption by the House and Senate of Concurrent Resolution 1006 which proposed to set forth the ground rules for the upcoming congressional redistricting. His testimony makes it clear that it was the desire of the legislature to adopt a 1991 congressional redistricting plan that was as close to the plan approved by the *Doulin* Court as possible. The whole idea was to try to make as few changes as possible to meet the "one person, one vote" standard. The legis-

lature wished, to the extent possible, to leave people and counties within the same congressional district wherein they were located in 1982 after the *Doulin* decision. The members were interested in preserving traditional communities of interest. And they wanted the plan to maintain the integrity of county and city boundaries.

Six separate bills and plans were submitted to the legislature which would result in variances of less than 0.73%—the variance occasioned by Act 1220 of 1991. For instance HB 1883 would have had only a 0.11% variance; HB 1930 a .65% variance and the "Capps" proposal, a 0.41% variance. But no proposal produced fewer shifts of counties or less movement of population than Act 1220. More specifically Act 1220 of 1991 resulted in the relocation of six counties into different congressional districts from those in which they were located in 1982, and the changes made affected a total population of only 96,164. By contrast HB 1883 affected seven counties and 130,280 people; HB 1930, eight counties and 144,801 people; HB 1942, eight counties and 127,459 people; and S.B. 727, thirteen counties and 236,565 people.

As noted above the plan approved in *Doulin* produced a variance of 0.78%, which is in excess of the .73% variance for Act 1220 of 1991. Judge Arnold in *Doulin* pointed out that state policy can be a factor only in choosing between two proposed remedies, both of which are "fully adequate to redress constitutional violations." If the .78% variance met this test in *Doulin* then it would appear that the .73% variance also meets that test here. Does *Karcher v. Daggett*, 462 U.S. 725 (1983) alter the test?

There is no question that here, as in *Doulin* the legislature could have adopted a redistricting plan—even one respecting the integrity of county and city boundaries—that would have produced a variance from the ideal of less than that produced by Act 1220. The question then becomes whether this higher variance is needed to achieve

some "legitimate state objective". The *Karcher* Court stated:

> "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives .... The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to those factors."

No plan suggested by the plaintiffs or intervenors would meet the twin objectives of causing the fewest changes in the location of counties and people as well as Act 1220. Those are two key legitimate legislative objectives. That Act also preserved other values important to the state as set forth in Concurrent Resolution 1006.

The Flannigan [sic] proposal (H.B. 1883) is the only one posing a serious challenge and, indeed, the only one producing a significant reduction in the variance. The other two which merit some consideration would be H.B. 1930 (which would reduce the variance from .73 to .65 or a total of .08) and the "Capps proposal" (which would reduce the variance from .73 to .41, or a total of .32). But H.B. 1883 stretches from the Missouri to the Louisiana line and splits the "mountain" community of interest.

The Court acknowledges that this is a close case. The opponents to Act 1220 have done an excellent job in exposing the weaknesses of the defendants' case. Nevertheless, the Court is of the opinion that it is obligated to give deference to the decision of the Arkansas Legislature, whose duty it is, after all, to formulate and enact a redistricting plan. The Court finds that the guideline decisions made by the legislature concerning redistricting were legitimate and reasonable and were also within its competence to make. The mal-apportionment claim of the plaintiffs and of the Lonoke County intervenor, Mr. Malone, must therefore be dismissed.

For the Court:

DATED: November 15, 1991.

/s/ Garnett Thomas Eisele

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CIVIL No. LR-C-91-295

JESSIE TURNER; CHRISTINE BROWNLEE; JACK FOSTER; ALAN SMITH; AND FREDDIE LYON
PLAINTIFFS

V.

THE STATE OF ARKANSAS; BILL CLINTON, Governor of the State of Arkansas; WILLIAM J. McCUEN, Secretary of State of the State of Arkansas; JOHN M. LIPTON, Speaker of the Arkansas House of Representatives; and JERRY P. BOOKOUT, President Pro Tempore of the Arkansas Senate
DEFENDANTS

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

NOV 15 1991

CARL R. BRENHS, CLERK
By:_____
DEP CLERK

JUDGMENT

Pursuant to the findings and conclusions stated in the Memorandum Opinion and Order of even date herewith, Summary Judgment is granted in favor of the Defendants

upon the Plaintiffs' Complaint and the Walker Intervenors' Complaint in Intervention with respect to their claims that Act 1220 of 1991 of the Arkansas Legislature violated such Plaintiffs' and Intervenors' rights under Section 2 of the Voting Rights Act and also under the Fourteenth and Fifteenth Amendments to the United States Constitution.

IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Complaints of the Plaintiffs and the Walker Intervenors herein alleging violation of their rights under Section 2 of the Voting Rights Act and under the Fourteenth and Fifteenth Amendments of the Constitution, be, and they are hereby, dismissed.

And it appearing that the Plaintiffs' and the Lonoke County Intervenor, Mr. Malone's Complaints asserting malapportionment claims have also been dismissed,

IT IS HEREBY, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Complaints of all Plaintiffs and all Intervenors are hereby, dismissed.

Dated this 15th day of November, 1991.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 11/18/91 BY JS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CASE NO. LR-C-91-295

JESSE TURNER; CHRISTENE BROWNLEE; JACK FOSTER; ALAN SMITH AND FREDDIE LYON

[PLAINTIFFS]

WILLIAM WALKER, JR.; JERRY JEWELL; JEAN EDWARDS; BILL LEWELLEN; WILLIAM TOWNSEND; IRMA BROWN; BEN MCGEE; JUDY SMITH; T.E. PATTERSON; KATHESTELLE BRYANT AND EVANGELINE BROWN

PLAINTIFF-INTERVENORS

JIM MALONE, JR.

PLAINTIFF-INTERVENOR

VS.

THE STATE OF ARKANSAS; BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS; WILLIAM J. MCCUEN, SECRETARY OF STATE OF THE STATE OF ARKANSAS; JOHN M. LIPTON, SPEAKER OF THE ARKANSAS HOUSE OF REPRESENTATIVES AND JERRY P. BOOKOUT, PRESIDENT PRO TEMPORE OF THE ARKANSAS SENATE

DEFENDANTS

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

DEC 10 1991

CARL R. BRENTS, CLERK
By:PLAINTIFFS
DEP. CLERK

NOTICE OF APPEAL

NOTICE is hereby given that the Plaintiffs appeal to the United States Supreme Court from the Judgment, the Opinion Mal-Apportionment Claim and the Memorandum Opinion and Order all filed on November 15, 1991, by the Three-Judge District Court convened pursuant to 28 U.S.C. § 2284 to hear the above-styled cause.

DATED this 10th day of December, 1991.

Respectfully submitted,

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By:/s/ Bob R. Brooks, Jr.
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Bob R. Brooks, Jr. do hereby certify on this 10th day of December, 1991, that a true and correct copy of the foregoing has been mailed with sufficient postage thereon to:

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Assistant Attorney General
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Little Rock, AR 72201-2610

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Hon. Theodore McMillian
Circuit Judge
526 U.S. Court & Custom House
1114 Market Street
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Hon. G. Thomas Eisele
Senior U. S. District Judge
P. O. Box 3684
Little Rock, AR 72203

Hon. Henry Woods
United States District Judge
P. O. Box 869
Little Rock, AR 72203

/s/ Bob R. Brooks, Jr.
Bob R. Brooks, Jr.

APPENDIX E

Supreme Court of the United States

No.-519

Jesse Turner, et al.,

Petitioners

v.

Arkansas, et al.

ORDER

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time to docket an appeal in the above-entitled case, be and the same is hereby, extended to and including April 8, 1992.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 23rd

day of January, 1992.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LRC-91-295

JESSIE TURNER; CHRISTENE BROWNLEE; JACK FOSTER; ALAN SMITH AND FREDDIE LYON
PLAINTIFFS

vs.

THE STATE OF ARKANSAS; BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS; AND WILLIAM J. MCCUEN, SECRETARY OF STATE OF THE STATE OF ARKANSAS; JOHN M. LIPTON, SPEAKER OF THE ARKANSAS HOUSE OF REPRESENTATIVES; AND JERRY P. BOOKOUT, PRESIDENT PRO TEMPORE OF THE ARKANSAS SENATE
DEFENDANTS

FILED

U.S. District Court
Eastern District Arkansas

May 17, 1991

Carl R. Brents, Clerk
By: _____
Dep. Clerk

COMPLAINT FOR DECLARATORY RELIEF, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Plaintiffs for themselves and for and on behalf of all persons similarly situated and for their Complaint against the Defendants, state:

1. This is an action for injunctive, declaratory and other relief to redress the deprivation of rights and privileges secured Plaintiffs under the Voting Rights Act Amendments of 1982, Public Law 97-205, Section 3, June 29, 1982, which is codified as 42 U.S.C. § 1973. This action also alleges a violation of 14th and 15th Amendment of the Constitution of the United States and under 42 U.S.C. § 1981 and § 1983.

JURISDICTION

2. Jurisdiction of this Court is invoked in accordance with the provisions of 28 U.S.C. § 1343(4) which provides for the institution in a district court of the United States of an action to secure equitable relief under an act of Congress, that protects civil rights, including the right to vote. This action seeks declaratory relief pursuant to 28 U.S.C. § 2201 and § 2202 that the State of Arkansas through its officials has unconstitutionally apportioned the Congressional Districts of Arkansas. Accordingly, this action is a proper one for which a three-judge court is required to be convened as provided in 28 U.S.C. § 2284.

VENUE

3. Venue in this action is proper in the Eastern District of Arkansas, Western Division since a majority of the Plaintiffs reside in the Eastern District of Arkansas. Moreover, the events complained of herein occurred in the Western Division of the Eastern District of Arkansas wherein the seat of government of Arkansas is located.

PARTIES

4. The Plaintiff, Jessie Turner, is a resident, elector and taxpayer of Jefferson County, Arkansas.

5. The Plaintiff, Jack Foster, is a resident, elector and taxpayer of Jefferson County, Arkansas.

6. The Plaintiff, Christene Brownlee, is the elected State Representative for House District 38 and is a resident, elector, and taxpayer of Crittenden County, Arkansas.

7. The Plaintiff, Alan M. Smith, is a resident, elector, and taxpayer of Sebastian County, Arkansas.

8. The Plaintiff, Freddie Lyon, is a resident, elector, and taxpayer of Calhoun County, Arkansas.

9. The Defendant, Bill Clinton, is the governor of the State of Arkansas, and in such capacity is the Chairman of the State Board of Election Commissioners which is charged with supervising and conducting elections and for certifying the results of congressional elections.

10. The Defendant, Jerry P. Bookout is the President Pro Tempore of the Arkansas Senate.

11. The Defendant, John M. Lipton is Speaker of the Arkansas House of Representatives.

12. The Defendant, State of Arkansas, through official acts performed by its officials, has established the district boundaries for all Congressional Districts within its boundaries.

13. The Defendant, William J. McCuen, is the Secretary of State for the State of Arkansas, and in such capacity is a Secretary of the Board of Election Commissioners which is charged with supervising and conducting elections, and for certifying the results of congressional elections.

14. Each of the Plaintiffs is a member of a protected class within the meaning of subsection (a) of the Voting Rights Act Amendments of 1982. Each of the Plaintiffs are adult black residents of the respective counties and are registered voters.

15. All individual Defendants named herein are named in their official capacities only.

CLASS ACTION

16. This is a class action brought by the Plaintiffs, Jessie Turner, Christene Brownlee, Freddie Lyon, and Jack Foster on behalf of the voting age black residents, both registered and unregistered to vote, that reside within the First, Second and Fourth Congressional Districts of the State of Arkansas. These residents are members of a protected class within the meaning of subsection (a) of the Voting Rights Act Amendments of 1982. The Plaintiff, Alan M. Smith, is representative of the voting age residents of the Third Congressional District of the State of Arkansas and is a party to this lawsuit for the purposes of Count III. This action is brought in accordance with provisions of Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs seek to represent the class comprised of all blacks that are eligible to vote in congressional elections. Questions of law and fact pertinent to this action are common to all members of the class. The class is so numerous that joinder of all members is impractical. The members of the class are aggrieved because of the acts complained of herein below. The Plaintiffs will fairly and adequately protect and represent the interest of the class. By reason of the nature of the relief sought in this action the disposition of Plaintiffs' claims will have an effect on all members of the class.

17. The acts of the Defendants and the relief to be requested from the Defendants have affected or will affect the members of the class similarly.

FACTUAL BACKGROUND

18. The 1990 census established the population of the State of Arkansas to be 2,350,725 residents. This populations entitles Arkansas to retain its four federal congres-

sional districts, but the 1990 census reflected a shift in population which required the drawing of new district boundaries. The congressional district boundaries were last established in 1982 after the 1980 census. The district boundaries were established by a three-judge panel of the United States District Court for the Eastern District of Arkansas in the case of *Doulin v. White*, 528 F. Supp. 1323 (E.D. Ark. 1982). A copy of the previous redistricting plan is attached hereto as Exhibit "A" and made a part hereof.

19. According to the 1990 census, the State has a white population of 1,944,744 persons and a black population of 373,912 persons. The optimum number of residents for each of the four congressional districts is 587,681.

20. Under the Constitution of the State of Arkansas it is the responsibility of the General Assembly to draw the boundaries for the four congressional districts.

21. Before considering any redistricting plans, the 78th General Assembly adopted House Concurrent Resolution No. 1006 on March 7, 1991, which established the criteria by which congressional redistricting plans would be measured. House Concurrent Resolution No. 1006 is attached hereto as Exhibit "B" and made a part hereof. One of the guidelines provides as follows:

> The dilution of voting strength and participation by recognized minorities within the state population is contrary to the Voting Rights Act of 1965, the U.S. Constitution, and the public policy of the State of Arkansas. The right of meaningful political participation of all citizens is desired and recognized. Therefore, any plan or proposed amendment to a plan having the objective of diluting the voting strength of minority citizens shall be unacceptable.

22. During the course of the debate on the redistricting issue, House and Senate members of the 78th General

Assembly introduced bills setting forth various redistricting proposals. Among these proposals were the following:

Sponsor	Bill No.	Exhibit to Complaint
Dowd/Harriman	SB 691	C
Foster	HB 1930	D
Flanigan	HB 1883	E
Capps	HB 1942	F
Miller	HB 2056	G
Hutchinson	HB 1953	H
McGee	HB 2071	I
Allen	HB 2118	J
Llewellen	SB 721	K

23. The 78th General Assembly ultimately passed the Dowd/Harriman plan (SB 691) which was signed into law by Defendant Bill Clinton on April 10, 1991, as Act 1220. This law becomes effective on July 15, 1991. A copy of Act 1220 is attached hereto as Exhibit "L" and made a part hereof.

24. At the time the 78th General Assembly adopted the Dowd/Harriman plan (SB 691) the members were aware that the black citizens of this State have endured a history of discrimination in the voting booth and in the political process in general. Members were also aware that the black population of Arkansas is concentrated in the Delta region, parts of Pulaski County, and in the southern counties of the State. The members were also aware that the 1980 redistricting plan and the proposed Dowd/Harriman plan fractured the black population between the First, Second, and Fourth Congressional Districts. Under the Dowd/Harriman plan the black population in the First District is 17.9%; the Second District is 17.6%; the Third District is 1.6%; and in the Fourth District is 26.6%.

25. The Arkansas House of Representatives rejected HB 1953 and HB 2071, both of which would have created a new Fourth Congressional District which would have con-

tained a black population of between 42 and 43%. Likewise, the Arkansas Senate rejected SB 721 which had been amended to be identical to HB 2071 submitted in the House.

CLAIMS FOR RELIEF

COUNT I—CIVIL RIGHTS CLAIM

26. Plaintiffs reallege the aforementioned paragraphs in support of this claim.

27. Plaintiffs' first claim is brought pursuant to 42 U.S.C. § 1983 to enforce the equal protection clause of the 14th Amendment and the 15th Amendment to the United States Constitution and pursuant to 42 U.S.C. § 1981.

28. Act 1220 adopted by the State of Arkansas was designed to dilute black voting strength in the First, Second, and Fourth Congressional Districts. This dilution was the result of intentional discriminatory conduct on the part of the Defendants as evidenced by the following:

(a) The Defendants were aware that SB 691 fractured the black population of this State into three different congressional districts.

(b) The Defendants were presented with a plan that would prevent the dilution of minority voting strength.

(c) The Defendants adopted HCR 1006 that included an admonition against the dilution of minority votes.

(d) The Defendants were thoroughly familiar with the political and demographic background pertaining to the various congressional districts.

(e) The Defendants had available the census figures on the racial breakdown of each district, county, and smaller census tracts.

(f) Although questions of minority representation were brought before the 78th General Assembly repeatedly, the

legislature took no affirmative action to ensure that a congressional district was created with a maximum percentage of black residents.

(g) Representative Ben McGee requested the legislature to postpone action on the redistricting proposals until guidance could be obtained from the Department of Justice, Civil Rights Division, in regard to possible noncompliance of the proposed redistricting plan with the Voting Rights Act of 1982. The Defendants ignored this request.

(h) The Defendants were aware of the decision of the three-judge panel of the Federal District Court in *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) which struck down the 1981 legislative apportionment plan as violative of the Voting Rights Act. The *Jeffers* decision held that voting in the Delta region of the State is markedly polarized by race.

(i) Notwithstanding the legislators' knowledge of the above facts, sponsoring legislators testified that the effect of the proposed plans on racial minorities was not considered.

29. All of the above factors indicate intentional conduct on the part of the Defendants designed to dilute the vote of the black citizens of Arkansas in violation of the 14th and 15th Amendments to the United States Constitution.

30. Plaintiffs request a declaratory judgment striking down the present congressional redistricting plan as being in violation of the United States Constitution and federal law and for injunctive relief to prohibit the enforcement of the plan. Plaintiffs also request the Court to adopt the plan proposed in HB 2071 or a similar plan that will not dilute minority voting strength.

COUNT II—VOTING RIGHTS ACT CLAIM

31. Plaintiffs reallege the aforementioned paragraphs in support of this claim.

32. The redistricting plan (Dowd/Harriman plan) adopted by the Defendants is also in violation of 42 U.S.C. § 1973 which is the Voting Rights Act of 1965, as amended in 1982. The Voting Rights Act has been violated by the Defendants for the reason that the congressional district boundaries have been drawn to dilute black voting strength and has the effect or result of giving the black citizens of this State less opportunity than other members of the electorate to elect representatives of their choice. This dilution is the product of an aggregate of factors including those factors mentioned in Count I, above. In addition, the following factors support this voting rights challenge to the present redistricting plan:

(a) According to the 1990 census, the three most populous counties in terms of black population are Pulaski with 92,200 black residents; Jefferson with 36,877 black residents; and Crittenden with 21,401 black residents. The Defendants have placed these three counties in three different congressional districts under the Dowd/Harriman plan. Pulaski is in the Second District, Jefferson is in the Fourth District, and Crittenden is in the First District.

(b) There exists a community of interest in the Delta region of the State which runs from Mississippi County in the northeast to Chicot County in the southeast. This community of interest is ignored and fractured in the Dowd/Harriman redistricting plan.

(c) The largest percentage growth of black residents in any county in the State between the 1980 census and the 1990 census occurred in Pulaski County which grew by more than 10,000 residents. Much of this growth occurred as a result of black residents moving from the Delta region to the urban area of Pulaski County. There exists a community of interest and bond between the black residents of eastern Arkansas and the black residents of Pulaski County. This community of interest is ignored under the Dowd/Harriman redistricting plan.

(d) The boundary that has been established between the First, Second, and Fourth Congressional Districts of the Dowd/Harriman plan has the direct effect of diluting black voting strength within the districts.

(e) The area embraced by the First, Second, and Fourth Congressional Districts has a history of racially polarized elections as found in the case of *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989).

(f) Present residential housing patterns within Pulaski County demonstrate the cohesiveness of racial minorities and would allow the high density black population centers to be combined with a Delta-type district which would avoid the dilution of minority voting strength.

(g) In the modern history of the area covered by the First, Second and Fourth Congressional Districts there has never been a black congressman elected to the U.S. House of Representatives. There have been unsuccessful black congressional candidates and the voting pattern history indicates racial block voting.

33. By reason of the significance that race had in the past and continues to have in the politics and culture of the area embraced by portions of the First, Second, and Fourth Congressional Districts, the aggregate of the factors discussed above, render the present boundaries invalid by reason of unlawful dilution and the reducing of black voting strength within the area encompassed in the proposed Fourth Congressional District outlined in House Bill 2071. This dilution is in violation of the Voting Rights Act and Plaintiffs are entitled to relief.

34. Plaintiffs request the Court to strike down the Dowd/Harriman redistricting plan and to order the adoption of a redistricting plan the same as or similar to House Bill 2071 in order to avoid the dilution of minority voting strength. Plaintiffs' further seek declaratory and injunctive relief to that effect.

COUNT III—MALAPPORTIONMENT CLAIM

35. Plaintiffs reallege the aforementioned paragraphs in support of this claim.

36. Act 1220 as adopted by the Defendants does not create congressional districts with a reasonably equal number of citizens per district.

37. The average population per congressional district under the 1990 census is 587,681.

38. Act 1220 enacted by the State of Arkansas creates districts which range from a population of 585,202 in the fourth district to a population of 589,523 in the third district.

39. The Third Congressional District is the fastest growing area of the State and yet Act 1220 provides for a Third Congressional District which has a variance of 1,842 residents over the optimum number.

40. The 78th General Assembly had before it other plans which had smaller variances than allowed by Act 1220. Specifically, HB 2071 reflects a smaller variance than the adopted plan. This can be demonstrated as follows:

Plan	First District	Second District	Third District	Fourth District	Total Variance
SB 691	588,588	587,412	589,523	585,202	.73
HB 2071	587,719	586,351	587,725	588,930	.44
HB 1883	587,998	587,352	587,858	587,517	.11
HB 1942	588,588	587,352	586,184	588,601	.41

41. The Plaintiff, Christene Brownlee, and the other class members are underrepresented in the proposed Dowd/Harriman plan for the First Congressional District. The Plaintiff, Alan M. Smith, and other residents in the Third Congressional District are underrepresented by the enactment of Act 1220.

42. At the time when the current congressional redistricting plan was adopted, the members of the 78th General Assembly knew the extent of the deviation of population sizes from the average population per congressional district, and they enacted the apportionment disregarding this deviation.

43. The apportionment of the congressional districts in Arkansas as described above, results in certain members of the class being underrepresented, does not comply with the "one-person—one vote" requirement for congressional apportionment, and denies Plaintiffs their right to equal protection under the 14th Amendment to the United States Constitution. Plaintiffs request the redistricting proposal adopted by the Defendants to be ruled unconstitutional.

WHEREFORE, the Plaintiffs respectfully pray for the following relief:

(a) A declaratory judgment declaring the present redistricting plan to be unconstitutional and in violation of the Voting Rights Act;

(b) A permanent injunction which perpetuates the terms of the declaratory order prayed for in subparagraph (a), above;

(c) A declaratory order adopting a constitutional redistricting plan the same as or similar to HB 2071; or, in the alterntive, an injunction which directs the Defendants to redraw the congressional district boundaries and to devise a constitutionally valid plan that does not dilute minority voting strength;

(d) Plaintiffs request this Court, upon a proper motion, to declare and certify this action to be a class action and to designate Plaintiffs named above as class representatives, and designate undersigned Plaintiffs' counsel as class counsel;

(e) Plaintiffs pray for an award of their costs for bringing this action and for reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

(f) For all other relief to which Plaintiffs may be entitled whether specifically prayed for herein or not.

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ATTORNEYS FOR PLAINTIFFS

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

C.A. No. LRC-91-295

JESSE TURNER; CHRISTENE BROWNLEE; JACK FOSTER; ALAN SMITH AND FREDDIE LYON

PLAINTIFFS,

William Walker, Jr.; Jerry Jewell; Jean Edwards; Bill Lewellen; William Townsend; Irma Brown; Ben McGee; Jacqueline Roberts; Judy Smith; T. E. Patterson; Kathestelle Bryant, and Evangeline Brown

PLAINTIFF-INTERVENORS,

vs.

THE STATE OF ARKANSAS; BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS; WILLIAM J. McCUEN, SECRETARY OF STATE OF THE STATE OF ARKANSAS; JOHN M. LIPTON, SPEAKER OF THE ARKANSAS HOUSE OF REPRESENTATIVES; AND JERRY P. BOOKOUT, PRESIDENT PRO TEMPORE OF THE ARKANSAS SENATE

DEFENDANTS.

FILED
US DISTRICT COURT
EASTERN DISTRICT ARKANSAS

JUN 18 1981

CARL R. BRENTS, CLERK
By: _____
DEP. CLERK

COMPLAINT IN INTERVENTION

Introduction

1. This action is brought by twelve African American registered voters, nine of whom are members of the Arkansas legislature, who seek to intervene in *Turner, et al.* v. *Arkansas, et al.*, LRC-91-295 (E.D. Ark. May 17, 1991), for the purpose of protecting their interests as African American voters in being able to participate equally in the political process. They allege that the federal congressional redistricting plan for the election of Arkansas Representatives to the United States House of Representatives, as adopted by the Arkansas General Assembly, denies African American citizens an equal opportunity to participate in the political process and influence electoral politics, in violation of section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1981 and 1983. Plaintiff-intervenors seek declaratory and injunctive relief prohibiting enforcement of the federal congressional districting plan.

Jurisdiction

2. This Court has jurisdiction pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. § 1343(4). This is an action arising under the statutes and Constitution of the United States and an action to enforce statutes and constitutional provisions that protect civil rights, including the right to vote. This action seeks declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and § 2202. Accordingly, this action is a proper one for which a three-judge court is required to be convened as provided in 28 U.S.C. § 2284

Parties

3. Plaintiff-intervenor William Walker, Jr. is an adult African American citizen of the United States who resides in Pulaski County, Arkansas. He is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. He is an elected member of the Arkansas House of Representatives.

4. Plaintiff-intervenor Jerry Jewell is an adult African American citizen of the United States who resides in Pulaski County, Arkansas. He is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. He is an elected member of the Arkansas Senate.

5. Plaintiff-intervenor Jean Edwards is an adult African American citizen of the United States who resides in Jefferson County, Arkansas. He is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. He is an elected member of the Arkansas Senate.

6. Plaintiff-intervenor Bill Lewellen is an adult African American citizen of the United States who resides in Lee County, Arkansas. He is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. He is an elected member of the Arkansas Senate.

7. Plaintiff-intervenor William Townsend is an adult African American citizen of the United States who resides in Pulaski County, Arkansas. H is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. He is an elected member of the Arkansas House of Representatives.

8. Plaintiff-intervenor Irma Brown is an adult African American citizen of the United States who resides in Pulaski

County, Arkansas. She is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. She is an elected member of the Arkansas House of Representatives.

9. Plaintiff-intervenor Ben McGee is an adult African American citizen of the United States who resides in Crittenden County, Arkansas. He is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. He is an elected member of the Arkansas House of Representatives.

10. Plaintiff-intervenor Jacqueline Roberts is an adult African American citizen of the United States who resides in Jefferson County, Arkansas. She is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. She is an elected member of the Arkansas House of Representatives.

11. Plaintiff-intervenor Judy Smith is an adult African American citizen of the United States who resides in Ouachita County, Arkansas. She is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives. She is an elected member of the Arkansas House of Representatives.

12. Plaintiff-intervenor T. E. Patterson is an adult African American citizen of the United States who resides in Pulaski County, Arkansas. He is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives.

13. Plaintiff-intervenor Kathestelle Bryant is an adult African American citizen of the United States who resides in Pope County, Arkansas. She is registered to vote, and is qualified to vote in Congressional elections for Arkansas

Representatives to the United States House of Representatives.

14. Plaintiff-intervenor Evangeline Brown is an adult African American citizen of the United States who resides in Chicot County, Arkansas. She is registered to vote, and is qualified to vote in Congressional elections for Arkansas Representatives to the United States House of Representatives.

15. Defendant Bill Clinton is the governor of the State of Arkansas, and in such capacity is the Chairman of the State Board of Election Commissioners, which is charged with supervising and conducting elections and certifying the results of congressional elections.

16. Defendant Jerry P. Bookout is the President Pro Tempore of the Arkansas Senate.

17. Defendant John M. Lipton is Speaker of the Arkansas House of Representatives.

18. Defendant State of Arkansas, through official acts performed by its officials, has established the district boundaries for all Congressional Districts within its boundaries.

19. Defendant William J. McCuen is the Secretary of State for the State of Arkansas, and in such capacity, is a Secretary of the Board of Election Commissioners, which is charged with supervising and conducting elections and certifying the results of congressional elections.

20. All individual Defendants named herein are named in their official capacities only.

Factual Allegations

21. The 1990 Census established the population of the State of Arkansas to be 2,350,725 residents. This population entitles Arkansas to retain its four existing federal congressional districts.

22. The 1990 Census reflected a shift in population which required the drawing of new district boundaries for the four federal congressional districts. The existing federal congressional district boundaries were established in 1982 after the 1980 Census. The district boundaries were established by a three-judge panel of the United States District Court for the Eastern District of Arkansas in *Doulin* v. *White,* 528 F. Supp. [1323] (E.D. Ark. 1982).

23. According to the 1990 Census, the state has a white population of 1,944,744 persons and a African American population of 373,912 persons (15.91%). Arkansas has a white voting age population of 1,470,211 persons; the state has an African American voting age population of 237,502 (12.73%). The optimum number of residents for each of the four federal congressional districts is 587,681.

24. Under the Constitution of the State of Arkansas, the General Assembly is responsible for drawing the boundaries for the four federal congressional districts.

25. Prior to consideration of redistricting plans, the 78th General Assembly adopted House Concurrent Resolution No. 1006 on March 7, 1991, which established the criteria by which congressional redistricting plans would be measured. One of the guidelines provides as follows:

> The dilution of voting strength and participation by recognized minorities within the state population is contrary to the Voting Rights Act of 1965, the U.S. Constitution, and the public policy of the State of Arkansas. The right of meaningful political participation of all citizens is desired and recognized. Therefore, any plan or proposed amendment to a plan having the objective of diluting the voting strength of minority citizens shall be unacceptable.

26. During the course of the debate on the redistricting issue, House and Senate members of the 78th General

Assembly introduced bills setting forth various redistricting proposals. Among these proposals were the following:

Sponsor	Bill No.
Dowd/Harriman	SB 691
Foster	HB 1930
Flanigan	HB 1883
Capps	HB 1942
Miller	HB 2056
Hutchinson	HB 1953
McGee	HB 2071
Allen	HB 2118
Lewellen	SB 721

27. The 78th General Assembly ultimately passed the Dowd/Harriman plan (SB 691), which was signed into law by Defendant Bill Clinton on April 10, 1991, as Act 1220. This law becomes effective on July 15, 1991.

28. The Dowd/Harriman plan (SB 691), as passed by the 78th General Assembly, fractures the African American population between the First, Second and Fourth Congressional Districts. Under the Dowd/Harriman plan, the African American population in the First District is 17.9%; the Second District is 17.6%; the Third District is 1.6%; and the Fourth District is 26.6%.

29. At the time of the adoption of the districting plan, members of the 78th General Assembly were aware that SB 691 fragmented the African American population of the state into three different congressional districts.

30. The political processes in Arkansas are not equally open to participation by African Americans, in that African Americans have less opportunity than other members of the electorate to participate in the political process and

elect representatives of their choice. For example, African American citizens continue to bear the effects of pervasive official and private discrimination in such areas as education, employment and health, which hinders their ability to participate in the political process.

31. At the time the 78th General Assembly adopted the Dowd/Harriman plan (SB 691), the members of the General Assembly were aware that the African American citizens of Arkansas have endured a history of discrimination in attempting to participate in the political process.

32. Voting in Arkansas is markedly polarized by race. *See Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 111 S. Ct. 662 (1991); *Smith* v. *Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988); *Perkins* v. *City of West Helena*, 675 F.2d 102 (8th Cir.), *aff'd*, 459 U.S. 801 (1982). Defendants were aware of this fact prior to the adoption of the present districting plan.

33. The Arkansas House of Representatives rejected HB 1953 and HB 2071, both of which would have created a new Fourth Congressional District containing an African American population of between 42% and 43%.

34. The Arkansas Senate rejected SB 721, which had been amended to be identical to HB 2071 and which would have prevented the dilution of minority voting strength.

35. Prior to the adoption of the districting plan, members of the 78th General Assembly had available census figures on the racial breakdown of each district, county and smaller census tracts.

36. Prior to the adoption of the districting plan, members of the 78th General Assembly were familiar with the political and demographic background pertaining to the various congressional districts.

37. Before adopting the present districting plan, questions of minority representation were brought before the

78th General Assembly repeatedly; however, the legislature took no action to ensure that a congressional district was created to permit African Americans an equal opportunity to participate in the political process. For example, plaintiff-intervenor Ben McGee requested the legislature to postpone action on the redistricting proposals until the U.S. Department of Justice, Civil Rights Division, could be consulted regarding possible noncompliance of the proposed redistricting plan with the Voting Rights Act. The members of the legislature ignored the request.

38. Prior to the adoption of the present districting plan, members of the 78th General Assembly were aware of the decision in *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 111 S. Ct. 662 (1991), which struck down the 1981 legislative apportionment plan as violative of the Voting Right Act.

39. Despite knowledge of the above facts, sponsoring legislators testified that the effect of the proposed plans on racial minorities was not considered.

40. Act 1220, adopted by the State of Arkansas, was designed to dilute African American voting strength in the First, Second and Fourth Congressional Districts in violation of the Fourteenth and Fifteenth Amendments of the United States Constitution. On information and belief, this dilution was the result of intentional discriminatory conduct on the part of Defendants.

41. According to the 1990 Census, the three most populous counties in terms of African American population are Pulaski County with 92,200 African American residents, Jefferson County with 36,877 African American residents, and Crittenden County with 21,401 African American residents. Under the plan adopted by the Arkansas legislature, defendants have placed these three counties in three different congressional districts; Pulaski County is in the Second District, Crittenden County is in

the First District and Jefferson County is in the Fourth District.

42. There exists a community of interest in the Delta region of the state which runs from Mississippi County in the northeast to Chicot County in the southeast. This community of interest is ignored and fragmented in the districting plan adopted by the 78th General Assembly.

43. Pulaski County is the most populated county in Arkansas and experienced the largest percentage and numerical growth of African American residents of any county in Arkansas from 1980 to 1990. According to the 1990 Census, the population of Pulaski County is 349,660. Currently, the African American population in Pulaski County is 92,200 (26.4%), as compared to 81,407 (23.9%) in 1980.

44. Much of the growth of the African American population in Pulaski County from 1980 to 1990 occurred as a result of African American residents moving from the Delta region to the urban area of Pulaski County, thereby creating a community of interest and bond between African Americans in these communities.

45. This community on interest between African Americans in Pulaski County and those in the Delta region was ignored by the 78th General Assembly in adopting the districting plan which established the First, Second and Fourth Congressional Districts.

46. The boundaries that have been established between the First, Second and Fourth Congressional Districts in the districting plan adopted by the 78th General Assembly have the effect of diluting African American voting strength.

47. The area embraced the First, Second and Fourth Congressional Districts has a history of racially polarized elections as found in *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 111 S. Ct. 662 (1991).

48. Pulaski County is no different from the Delta area and other areas of the state that have a significant concentration of African American residents. Voting is polarized by race, there have been no successful candidates for public office outside the majority African American areas, there have been racial appeals in elections, and socio-economic disparities between the races are marked. *Jeffers v. Clinton*, 703 F. Supp. 196 (E.D. Ark. 1989), 111 S. Ct. 662 (1991).

49. Present residential housing patterns within Pulaski County demonstrate the cohesiveness of racial minorities and would allow the high density African American population centers to be combined with the Delta area to create a district which would avoid the dilution of minority voting strength.

50. In the modern history of the area covered by the First, Second and Fourth Congressional Districts, there has has never been an African American elected to the United States House of Representatives. Since 1960, three African Americans have run unsuccessfully for Congress from the area covered by the First, Second and Fourth Congressional Districts.

51. The congressional district boundaries of the districting plan adopted by the 78th General Assembly have been drawn to dilute African American voting strength and have the effect of providing African American citizens of Arkansas less opportunity than other members of the electorate to participate equally in the political process in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

Allegations Regarding Intervention

52. On May 17, 1991, plaintiffs filed an action on behalf of the voting age African American residents, both registered and unregistered to vote, residing in the First, Second and Fourth Congressional Districts of the State of

Arkansas. Plaintiffs challenge the congressional redistricting plan for the election of Arkansas Representatives to the United States House of Representatives as violative of the United States Constitution and Section 2 of the Voting Rights Act.

53. Plaintiff-intervenors seek to intervene in this action, pursuant to Fed. R. Civ. P. 24(a) or 24(b), in order to protect the interests of African American voters in the State of Arkansas who will be affected by a decision in this case. They are entitled to intervene as a matter of right because: 1) their application is timely; 2) disposition of the action may impair or impede the ability of African American voters to protect their interest in ensuring that the districting plan for the election of Arkansas Representatives to the United States House of Representatives entitles them to participate equally in the political process with white voters; and 3) the proposed intervenors are not adequately represented by existing parties.

Claims for Relief

Count I

54. Plaintiff-intervenors reallege the contents of paragraphs 1-51.

55. The present districting scheme for the election of Arkansas Representatives to the United States House of Representatives was adopted with the intention and purpose of minimizing the political strength of African American voters in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and 42 U.S.C. §§ 1981 and 1983.

Count II

56. Plaintiff-intervenors reallege the contents of paragraphs 1-51.

57. The present districting scheme for the election of Arkansas Representatives to the United States House of Representatives has the result of denying African American voters an equal opportunity to participate in the political process with other members of the electorate, and thereby violates Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

Relief

WHEREFORE, plaintiff-intervenors' ask this Court to enter a judgment:

(a) Granting plaintiff-intervenors request to intervene in this action;

(b) Declaring the present redistricting plan unconstitutional and in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, and Section 2 of the Voting Rights Act;

(c) Enjoining the enforcement of the present redistricting plan;

(d) Adopting the districting plan proposed in HB 2071 or a similar districting plan which will allow African American voters equal access to the political process and will not dilute minority voting strength in violation of the United States Constitution; or, in the alternative, directing Defendants to redraw the congressional district boundaries and devise a plan that does not dilute minority voting strength;

(e) Granting plaintiff-intervenors their taxable costs in this action, necessary expenses of the litigation and reasonable attorney's fees;

(f) Providing such other relief as the Court finds just.

Respectfully submitted,

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Plaintiff Intervenors

CERTIFICATE OF SERVICE

I, P.A. Hollingsworth, do hereby certify that a copy of the foregoing was mailed this 17th day of June, 1991 to Time Humphries, Esquire, Assistant Attorney General, Tower Building, 4th & Center Streets, Little Rock, AR 72201; W. Asa Hutchinson, Esquire, Karr & Hutchinson, First National Bank Building, 602 Garrison Avenue, Suite 505, Forth Smith, AR 72901; and Bob Brooks, Esquire, Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd. Attorneys at Law, Post Office Box 5551, North Little Rock, AR 72119.

/s/ P.A. Hollingsworth
P.A. Hollingsworth

APPENDIX H

As Engrossed: 2/4/91 3/7/91

State of Arkansas

78th General Assembly

Regular Session, 1991 H.C.R. 1006

By: Representative Flanagin

HOUSE CONCURRENT RESOLUTION
"TO ESTABLISH CRITERIA FOR CONGRESSIONAL REDISTRICTING"

WHEREAS, in an effort to develop and adopt a constitutionally acceptable congressional redistricting plan, the House and Senate Committees on State Agencies and Governmental Affairs have reviewed various criteria adopted by sister states; and

WHEREAS, criteria adopted by both houses of the General Assembly would be useful in evaluating proposals for Congressional redistricting; and

WHEREAS, sound criteria based on interpretation by the courts of constitutional provisions and federal statutes provide guidance to the membership of the Arkansas General Assembly while preforming congressional redistricting;

NOW THEREFORE,

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE SEVENTY-EIGHTH GENERAL ASSEMBLY OF THE STATE OF ARKANSAS, THE SENATE CONCURRING THEREIN:

THAT the following guidelines are hereby adopted for use in congressional redistricting during the 78th Session of the Arkansas General Assembly:

1. EQUAL REPRESENTATION

Equality of population of congressional districts insofar as is practicable shall be the goal of congressional reapportionment.

(a) Deviations from the "ideal district population" shall be justifiable only when such is the result of a limitation of geography, or the result of the promotion of a preferred constitutionally acceptable state policy.

2. POPULATION DATA

The total state population and the population of defined sub-units thereof as reported to the state by the U. S. Department of Commerce, Bureau of the Census, as the official census information collected under P.L. 94-171 for the 1990 Federal Decennial Census shall be the exclusive permissible data base for congressional redistricting.

3. DISTRICTS

Only single-member congressional districts are acceptable.

The committees acknowledge a preference for continuity in representation. The committee shall give preference to a plan which departs as little as possible from the 1981 apportionment plan as developed by the court in Doulin v. White so long as such plan is otherwise constitutionally acceptable.

County lines, cities, and established geographical boundaries should be maintained, *if possible.*

4. MINORITY VOTING STRENGTH AND PARTICIPATION

The dilution of voting strength and participation by recognized minorities within the state population is contrary to the Voting Rights Act of 1965, the U. S. Constitution, and the public policy of the State of Arkansas. The right of meaningful political participation of all citizens is desired and recognized. Therefore, any plan or proposed amend-

ment to a plan having the objective of diluting the voting strength of minority citizens shall be unacceptable.

5. PUBLIC PARTICIPATION

The committees actively seek public participation in all deliberations concerning congressional redistricting. Notices of all committee meetings in which proposed legislation concerning congressional redistricting will be considered by the committees shall be provided and posted in accordance with the current rules of the House of Representatives, the Senate, and the Joint Interim Committee on State Agencies and Governmental Affairs. All interested parties are encouraged to appear before the committees during the legislative hearings on proposed plans to provide input regarding congressional redistricting.

/s/ P. Flanagin

APPENDIX I

ACT 1220 1991

As Engrossed: 3/6/91

State of Arkansas

78th General Assembly

Regular Session, 1991 SENATE BILL 691

By: Senators Dowd and Harriman

A Bill

For An Act To Be Entitled

"AN ACT TO PROVIDE FOR THE RESDISTRICTING OF THE CONGRESSIONAL DISTRICTS OF THE STATE OF ARKANSAS TO CONFORM TO THE 1990 UNITED STATES CENSUS: AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. The State of Arkansas is hereby divided into four (4) congressional districts, provided that the members of the House of Representatives of the United States Congress presently serving from each of the existing congressional districts of this State shall continue to serve until the expiration of their current terms, and successor Congressmen shall be elected from the congressional districts as established in this act. It is the intention of this act to provide for congressional districts of substantially equal population in order to comply with the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

SECTION 2. The First Congressional District shall be composed of the counties of: Arkansas, Clay, Cleburne,

Craighead, Crittenden, Cross, Fulton, Greene, Independence, Izard, Jackson, Lawrence, Lee, Lonoke, Mississippi, Monroe, Phillips, Prairie, Poinsett, Randolph, St. Francis, Searcy, Sharp, Stone, and Woodruff; and the qualified electors residing therein shall elect one (1) member of the House of Representatives of the United States.

SECTION 3. The Second Congressional District shall be composed of the counties of: Conway, Faulkner, Perry, Pulaski, Saline, Van Buren, White, and Yell; and the qualified electors residing therein shall elect one (1) member of the House of Representatives of the United States.

SECTION 4. The Third Congressional District shall be composed of the counties of: Baxter, Benton, Boone, Carroll, Crawford, Franklin, Johnson, Logan, Madison, Marion, Newton, Polk, Pope, Sebastian, Scott, and Washington; and the qualified electors residing therein shall elect one (1) member of the House of Representatives of the United States.

SECTION 5. The Fourth Congressional District shall be composed of the counties of: Ashley, Bradley, Calhoun, Chicot, Clark, Cleveland, Columbia, Dallas, Desha, Drew, Garland, Grant, Hempstead, Hot Spring, Howard, Jefferson, Lafayette, Little River, Lincoln, Miller, Montogomery, Nevada, Ouachita, Pike, Seviar, and Union; and the qualified electors residing therein shall elect one (1) member of the House of Representatives of the United States.

SECTION 6. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

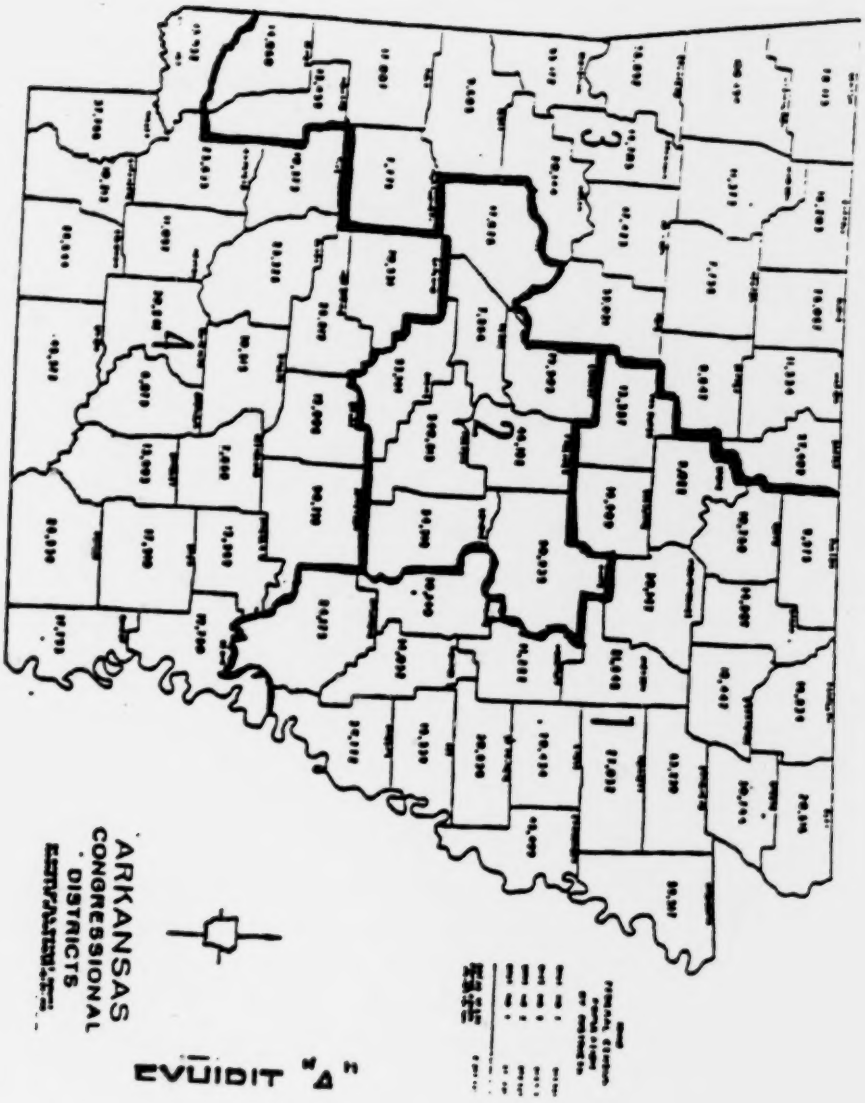
SECTION 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this and the provisions of this act are declared to be severable.

SECTION 8. All laws or parts of laws in conflict with this act are hereby repealed.

/s/Dowd, et al

APPROVED /s/Bill Clinton
4-10-91 GOVERNOR

APPENDIX J



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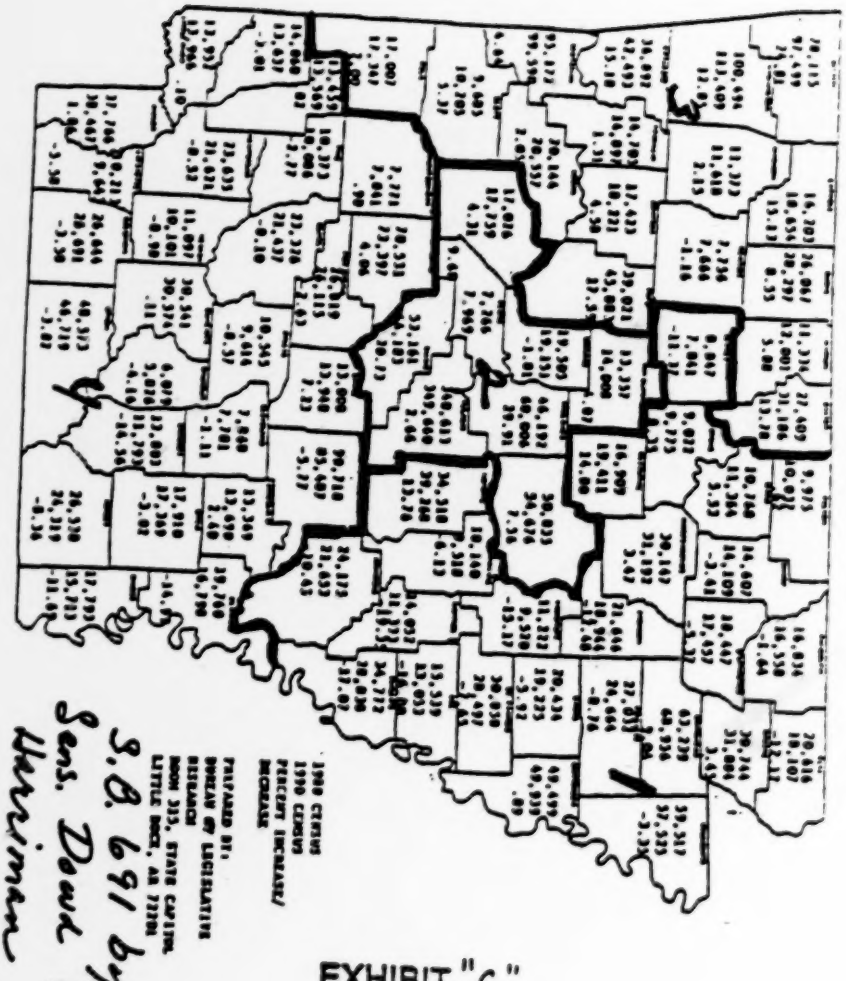


EXHIBIT "C"

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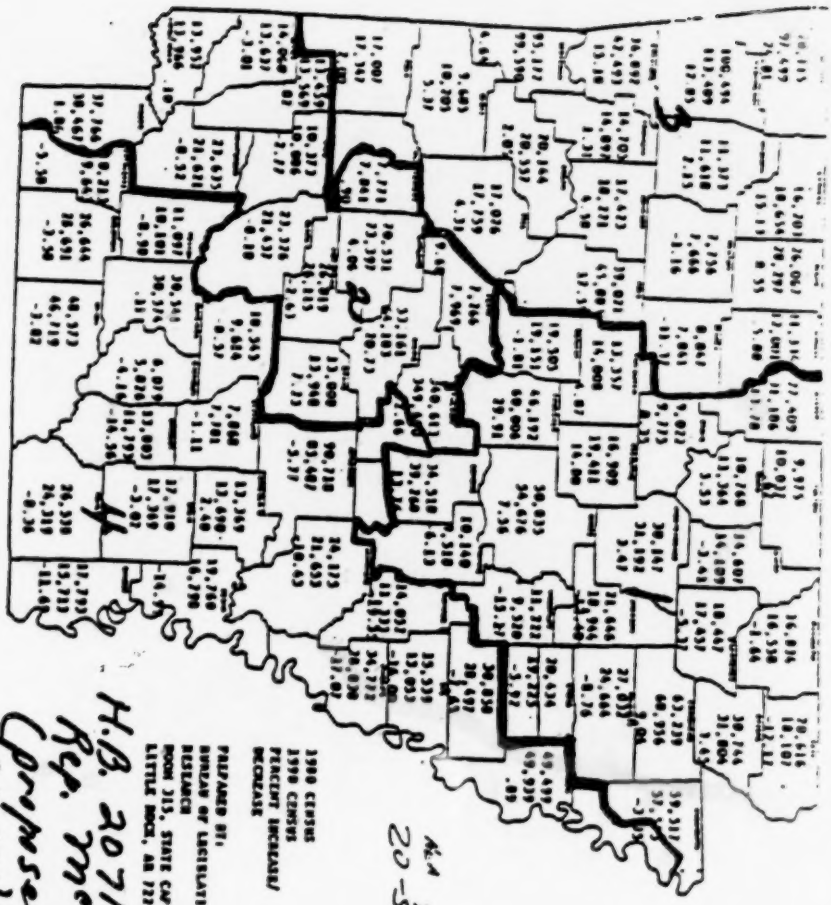


EXHIBIT "I"

H.B. 2071 Rep. Mc Cuiston Proposed Amendment

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